

No. 1875

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# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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BOISE CITY, a Municipal Corporation of the State of  
Idaho (Plaintiff),

Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER  
COMPANY, LIMITED (a Corporation), (Defendant),

Defendant in Error.

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## TRANSCRIPT OF RECORD.

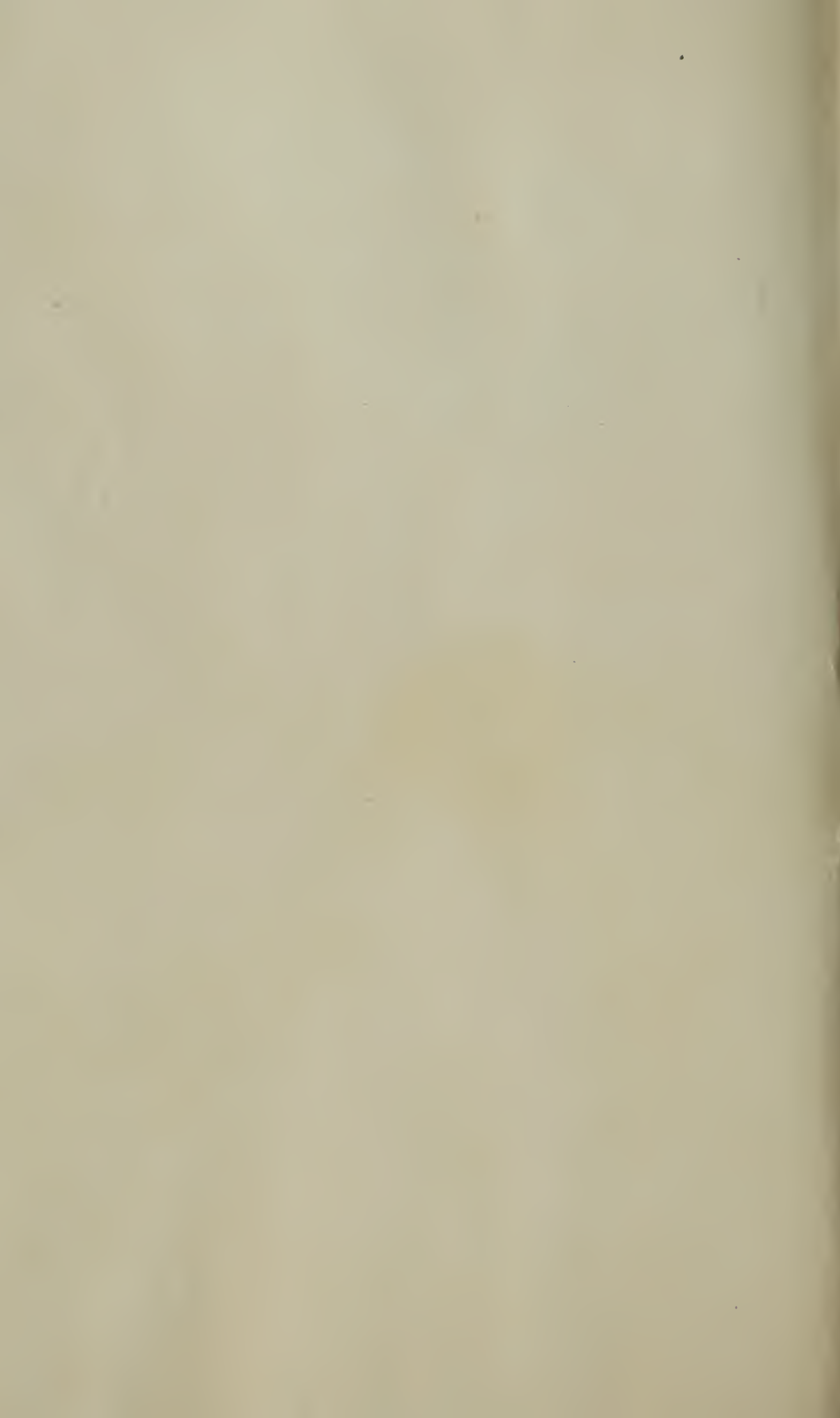
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Upon Writ of Error to the United States Circuit Court  
for the District of Idaho,  
Central Division.

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**FILED**

AUG 3 - 1910



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[Names and Addresses of Attorneys.]

FRANK B. KINYON, Esq., Messrs. CAVANAH  
& BLAKE, Boise, Idaho,

Attorneys for Appellant.

Messrs. JOHNSON & JOHNSON, Boise, Idaho,  
Attorneys for Appellee.

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*In the District Court of the Third Judicial District  
of the State of Idaho in and for the County of  
Ada.*

BOISE CITY, a Municipal Corporation of the State  
of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY (a Corporation),

Defendant.

**Amended Complaint.**

Comes now the above-named plaintiff, Boise City, a municipal corporation of the State of Idaho, and for cause of action against the defendant herein, complains and alleges:

I.

That the plaintiff, Boise City, is now and at all times hereinafter mentioned, has been a municipal corporation within the county of Ada, State of Idaho, created by and existing under the laws of the State of Idaho.

## II.

That the defendant is a private corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business at Boise City, Ada County, State of Idaho, and is authorized and empowered by its articles of incorporation to carry on and conduct a waterworks system and to sell and rent water to the inhabitants of said Boise City.

## III.

That on the third day of October, 1889, said Boise City, by its Mayor and Common Council, passed and adopted an ordinance granting to one H. B. Eastman and B. M. Eastman, and their successors in interest in their waterworks, a license for an indefinite period to lay, construct and repair water-pipes in the streets and alleys of said Boise City, through which water is now and at all times herein mentioned has been furnished by said defendant and its predecessors in interest in and to said waterworks system to the plaintiff, and the residents and inhabitants of said Boise City for profit, which said ordinance was accepted by the said predecessors in interest of said defendant in and to said waterworks system, a copy of said ordinance approved October 3d, 1889, is as follows, to wit:

## ORDINANCE No. 94.

AN ORDINANCE GRANTING TO EASTMAN BROTHERS THE RIGHT TO LAY WATER PIPES IN BOISE CITY.

The Mayor and Common Council of Boise City, I. T., ordain:

Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipes in, through, along and across the streets and alleys of Boise City, under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along or across which they may lay such pipes in as good condition as they shall find the same, and shall at all times promptly repair all damages done by them or their pipes or by water escaping therefrom.

Section 2. This ordinance shall take effect from and after its passage and approval.

Passed the Council this 3d day of October, 1889.

Approved:

JAMES A. PINNEY,

Mayor.

[Seal] Attest: C. S. McCONNEL,

City Clerk.

#### IV.

That the said defendant, The Boise Artesian Hot and Cold Water Company, now is and has been for a period of more than two years last past, the successor in interest of the said H. B. Eastman and B. M. Eastman, in and to the waterworks system herein referred to, and are now and for a period of more than two years last past, has been engaged in the sale and rental of water for profit from its said waterworks system to the plaintiff and the residents and inhabitants of said Boise City under the provisions of the aforesaid ordinance and license.



## V.

That the said defendant, the Boise Artesian Hot and Cold Water Company, and its predecessors in interest in and to its said waterworks system, are now, and ever since the 3d day of October, 1889, have been using the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff and the residents and inhabitants of said Boise City through the water-pipes of said waterworks system, and in the laying and repairing of said water-pipes connected with its said waterworks system.

## VI.

That the plaintiff, Boise City, on the 7th day of June, 1906, enacted and approved an Ordinance of said City No. 678, requiring the said defendant, the Boise Artesian Hot and Cold Water Company to pay to said Boise City on the first day of each and every month, a monthly license of three hundred (\$300.00) Dollars for the use and occupancy of the streets and alleys of said Boise City by the said defendant in the sale and delivery of water to the plaintiff and the residents and inhabitants of said Boise City, through the said water-pipes of said defendant laid and maintained by said defendant in the streets and alleys of said Boise City, and for the privilege granted by the aforesaid Ordinance No. 94, approved October 3, 1889; that in said Ordinance No. 678, demand was thereby made by said Boise City of and from the said defendant to thereafter pay to said Boise City on the first day of each and every month, said monthly license of \$300.00,

and the City Clerk of said Boise City was required by the provisions of said Ordinance No. 678 to notify said defendant of the requirements of said Ordinance No. 678.

#### VII.

That the whole number of the members of the Common Council of the plaintiff, Boise City, on the 7th day of June, 1906, was twelve (12) members, and that said Ordinance No. 678, after the same was vetoed by the Mayor of the plaintiff on the 2d day of June, 1906, was thereafter on the 7th day of June, 1906, passed by the common council of said Boise City over the veto of said Mayor by a two-third vote cast by the members of the Common Council of said Boise City.

#### VIII.

That the City Clerk of said Boise City duly notified the said Boise Artesian Hot and Cold Water Company of the requirements of said Ordinance No. 678, and from and after the enactment of said Ordinance No. 678, and until this action was begun did on the first day of each and every month demand of said defendant the payment of said monthly license of \$300.00 required by said ordinance, but the said defendant refused on the first day of each and every month after the enactment and approval of said ordinance No. 678 until the beginning of this suit, and still refuses and neglects to pay said monthly license or any part thereof to said Boise City.

#### IX.

That on the 6th day of December, 1906, the plaintiff by its Mayor and Common Council, passed and

approved an Ordinance No. 699, requiring and ordering the proper officers of said Boise City to institute an action for and on behalf of said Boise City in any Court of competent jurisdiction against the said defendant for the enforcement of the provisions of said Ordinance No. 678, and the collection from said defendant of the sum of money due said Boise City from said defendant under the provisions of said Ordinance No. 678.

X.

That all of the aforesaid ordinances referred to herein are now and ever since their said passage and approval have been in force and have never been repealed.

XI.

That the said defendant and its predecessors in interest in and to said waterworks system have never at any time paid to said Boise City any compensation for the use and occupancy of said streets and alleys of said Boise City by the said waterworks system of the defendant.

XII.

That by reason of the enactment and approval of the aforesaid ordinance and the use and occupancy of the said streets and alleys of said Boise City by the said defendant as aforesaid with its said waterworks system, the said defendant became and was on the first day of April, 1909, and now is indebted to Boise City in the sum of Ten Thousand One Hundred Thirty (\$10,130.00) Dollars due as said license.



XIII.

That the said plaintiff did on the first day of each and every month from the said 7th day of June, 1906, to the first day of April, 1909, demand of the said defendant to pay the said amount due as said license, but the defendant refused and neglected to pay the same or any part thereof and that there is due and owing to the plaintiff on the first day of April, 1909, as such license the sum of Ten Thousand One Hundred Thirty (\$10,130.00) Dollars.

Wherefore, the plaintiff prays judgment against the defendant herein for the sum of Ten Thousand One Hundred Thirty (\$10,130.00) Dollars, together with interest thereon at the rate provided by law, from the date of filing this complaint until paid and for costs of suit.

F. B. KINYON,  
Attorney for Plaintiff.  
Residence, Boise, Idaho.

State of Idaho,  
County of Ada,—ss.

Joseph T. Pence, being first duly sworn for and on behalf of Boise City, the above-named plaintiff, deposes and says: That he has read the foregoing amended complaint, knows the contents thereof and the facts therein stated are true of his own knowledge, except as to those matters which are therein stated to be on his information or belief, and as to those matters that he believes it to be true. That the above-named plaintiff, Boise City, situated in Ada County, Idaho, is a municipal corporation

organized and existing under and by virtue of the laws of the State of Idaho, and that affiant is the duly elected, qualified and acting Mayor of said plaintiff, and therefore he makes this affidavit as such Mayor for and on behalf of said plaintiff.

JOSEPH T. PENCE.

Subscribed and sworn to before me this 26 day of April, 1909.

[Seal]

E. C. ROWELL,  
Notary Public.

Service of a copy of the foregoing Amended Complaint is hereby acknowledged this 12th day of May, 1909.

JOHNSON & JOHNSON and  
EDGAR WILSON,

Attorneys for Defendant.

[Endorsed]: Filed April 26, 1909. W. L. Cuddy,  
Clerk. By W. D. McReynolds, Deputy Clerk.

---

*In the District Court of the Third Judicial District  
of the State of Idaho in and for the County of  
Ada.*

BOISE CITY, a Municipal Corporation of the State  
of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED (a Corpora-  
tion),

Defendant.



**Petition for Removal.**

To the Honorable District Court of the Third Judicial District of the State of Idaho, in and for Ada County:

Your petitioner, the Boise Artesian Hot and Cold Water Company, Limited, the above-named defendant, appearing specially for the purpose of this petition only, respectfully shows to this Honorable Court, that this suit is of a civil nature, and that the matter and amount in dispute in said suit exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

That the controversy herein is and at the time of the commencement of this suit was between citizens of different States; and that your petitioner, the defendant in said suit, was, at the time of the commencement of the suit, and still is, a corporation organized and existing under the laws of the State of West Virginia, and a resident and citizen of said State and of no other State; and that the plaintiff, Boise City, is a municipal corporation organized and existing under the laws of the State of Idaho and a citizen of said state.

And your petitioner offers herewith a good and sufficient surety for its entering in the Circuit Court of the United States for the Central Division of the District of Idaho, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner therefore prays that the said surety and bond may be accepted; that this suit may be removed into the next Circuit Court of the United States to be held in the Central Division of the District of Idaho, pursuant to the Statutes of the United States in such case made and provided, and that no further proceedings may be had herein in this court.

And your petitioner will ever pray.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED, Petitioner.

By B. S. HOWE,  
Secretary.

EDGAR WILSON and  
JOHNSON & JOHNSON,  
Its Attorneys,

Specially appearing for the purposes of this petition only.

State of Idaho,  
County of Ada,—ss.

B. S. Howe, being first duly sworn, deposes and says that he is the secretary of the Boise Artesian Hot and Cold Water Company, Limited, the above-named petitioner and makes this verification for and on behalf of said petitioner. That the foregoing petition is true to his own knowledge.

B. S. HOWE.

Subscribed and sworn to before me this 13th day of May, 1909.

[Seal]

RICHARD H. JOHNSON,  
Notary Public.

[Endorsed]: Filed May 15, 1909. W. L. Cuddy,  
Clerk. By Otto F. Peterson, Deputy.

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*In the District Court of the Third Judicial District  
of the State of Idaho in and for the County of  
Ada.*

BOISE CITY, a Municipal Corporation of the State  
of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED (a Corpora-  
tion),

Defendant.

**Bond on Removal.**

Know All Men by These Presents: That the Boise Artesian Hot and Cold Water Company, Limited, as principal and Timothy Regan and James E. Clinton, Jr., of Boise City, Ada County, Idaho, as sureties, are holden and stand firmly bound unto Boise City, a municipal corporation of the State of Idaho, in the penal sum of one thousand dollars, for the payment whereof, well and truly to be made unto said Boise City, we bind ourselves, our heirs, representatives and assigns jointly and severally firmly by these presents,

Upon condition nevertheless that, whereas, the said Boise Artesian Hot and Cold Water Company, Limited, has petitioned the District Court of the Third Judicial District of Idaho, held in and for Ada County, for the removal of a certain cause



therein pending, wherein the said Boise City is plaintiff and the said Boise Artesian Hot and Cold Water Company, Limited, is defendant to the Circuit Court of the United States for the Central Division of the District of Idaho.

Now, if the said Boise Artesian Hot and Cold Water Company, Limited, shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, it shall remain in full force and virtue.

In Witness Whereof, the said Timothy Regan and James E. Clinton, Jr., have hereunto set their hands and seals this 13th day of May, 1909.

TIMOTHY REGAN. [Seal]

JAMES E. CLINTON, Jr. [Seal]

State of Idaho,  
County of Ada,—ss.

Timothy Regan and James E. Clinton, Jr., being first duly sworn, each for himself and not one for the other, deposes and says, that he resides in Boise City, Ada County, Idaho, and is freeholder therein and above all property, exempt from execution. and is worth the sum of two thousand dollars over

TIMOTHY REGAN.  
JAMES E. CLINTON, Jr.

Subscribed and sworn to before me this 14th day of May, 1909.

[Seal]

RICHARD H. JOHNSON,

Notary Public.

[Endorsed]: Filed, May 15, 1909. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

---

*In the District Court of the Third Judicial District  
of the State of Idaho in and for the County of  
Ada.*

BOISE CITY, a Municipal Corporation of the  
State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED (a Cor-  
poration),

Defendant.

### **Order of Removal.**

This cause coming on for hearing upon application of the defendant herein for an order transferring this cause to the United States Circuit Court for the District of Idaho, Central Division, and it appearing that the defendant has filed its petition for such removal in due form of law, and that defendant has filed its bond duly conditioned, with good and sufficient sureties as provided by law, and it appearing to the Court that by the filing of plaintiff's amended complaint the amount prayed for in said complaint and in controversy in this action, exclusive of interest and costs, has been increased from



seventeen hundred and fifty dollars, the amount prayed for in the original complaint, to ten thousand one hundred and thirty dollars, and that defendant has not pleaded to said amended complaint or demurred or answered thereto, and that the time has not elapsed wherein defendant is allowed under the practice and laws of the State of Idaho, and the rules of said court, to appear, plead, demur or answer said amended complaint, and it appearing that this is a proper cause for removal to said Circuit Court.

Now, therefore, it is hereby ordered and adjudged that this action be and it is hereby removed to the United States Circuit Court for the District of Idaho, Central Division, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 15 day of May, 1909.

FREMONT WOOD,

Judge.

[Endorsed]: Filed, May 15, 1909. W. L. Cuddy,  
Clerk. By Otto F. Peterson, Deputy.

[Certificate to Record on Removal.]

*In the District Court of the Third Judicial District  
of the State of Idaho, in and for the County of  
Ada.*

BOISE CITY, a Municipal Corporation of the  
State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED (a Cor-  
poration),

Defendant.

CLERK'S CERTIFICATE WITH RECORD.

State of Idaho,  
County of Ada,—ss.

I, W. L. Cuddy, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, hereby certify the above and foregoing to be a full, true and correct copy of the record, and whole thereof, in the above-entitled action, heretofore pending in said District court, being the action wherein Boise City, a Municipal Corporation is plaintiff and The Boise Artesian Hot and Cold Water Company, Limited, is defendant, said record consisting of the original complaint, filed on the 13th day of December, 1906, the summons and return thereon, filed on the 15th day of December, 1906, demurrer to original complaint filed on the 17th day of January, 1907, stipulation, filed on the 27th day of February, 1907, amended complaint, filed April 26th, 1909, order of the Court permitting plaintiff to file amended com-

plaint, petition for removal filed May 15th, 1909, bond on removal filed May 15th, 1909, and order of removal filed May 15th, 1909, all as appears on the files and of record in my office.

Given under my hand and the seal of said Court, at my office in Boise City, Idaho, this 17th day of May, 1909.

[Seal]

W. L. CUDDY,

Clerk of District Court, Ada County, Idaho.

By Otto F. Peterson,

Deputy.

I, Frank B. Kinyon, City Attorney of Boise City, and attorney for plaintiff herein, do hereby acknowledge the receipt of notice of the removal of said action to the Circuit Court of the United States for the District of Idaho, Central Division, and of the filing of the transcript of the record with the Clerk of said Circuit Court of the United States, this 17th day of May, 1909.

FRANK B. KINYON,

City Attorney and Attorney for Plaintiff.

[Endorsed]: Filed, May 17, 1909. A. L. Richardson, Clerk.

---

*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the  
State of Idaho, Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED (a Cor-  
poration), Defendant.

**Stipulation [Filed January 6, 1909, of Facts].**

It is hereby stipulated by counsel in the above-entitled action that the defendant has furnished water to plaintiff as shown in the annexed statement, during the years 1908 and 1909; and paid the defendant the amounts thereon stated.

That the city council of plaintiff in the month of December, 1909, by resolution directed defendant company to install fire hydrants for use by the city fire department on the defendant mains as follows: On the corner of North 17th and Sherman Streets, North 19th and Sherman Streets, North 17th and Brumback Streets, North 21st and Ressigue Streets, and West State and 19th Streets.

That the plaintiff reserves its objections to the admissibility of the above facts on the ground that they are irrelevant, immaterial and incompetent and not a defense to the action.

Dated January 6th, 1909.

F. B. KINYON and  
CAVANAH & BLAKE,  
Attorneys for Plaintiff.  
JOHNSON & JOHNSON.  
Attorneys for Defendant.



AMOUNTS PAID BY CITY OF BOISE TO THE  
BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, from January 1st, 1908,  
to December 1st, 1909.

Date Paid.	Domestic Use.	Flushing Sewers.	Street Sprinkling.	Heating.
1908				
January 4th	45.55	348.30...	880.80	
February 8	30.40	177.55...		
March 7	23.05	176.40...		
April 6	24.55	176.40...		
June 6	45.15	307.45...		
August 10	50.24	94.60...		
Sept. 10	29.66	47.30...		
Oct. 6	30.03	47.30...		
Nov. 7	31.16	47.30...	3,300.00	
Dec. 5	26.00	47.30...		500.00
1909				
January 6			354.46	
March 8	69.80	140.82...		
May 10	32.60	47.30...		
June 9	36.60	47.30...		
July 6	40.55	47.30...		
August 18	49.75	47.30...		
Oct. 4	67.50	94.60...	2,000.00	
Nov. 7	57.00	47.30...		337.00
Dec. 4	38.25	47.30...	1,763.84	
	<hr/>	<hr/>	<hr/>	<hr/>
	\$727.84	\$1,989.12	\$8,299.10	\$837.50



Summary:

Cold Water for Domestic Use.....	727.84
“ “ “ Sewer Flushing.....	1989.12
“ “ “ Street Sprinkling.....	8299.10
Hot Water for Heating City Hall.....	837.50
	<hr/>
Total.....	\$11853.56

[Endorsed]: Filed Jan. 6, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the  
State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED (a Cor-  
poration),

Defendant.

**Answer to Amended Complaint.**

The above-named defendant answers plaintiff's amended complaint filed in the above-entitled action, as follows:

I.

This defendant admits the first and second allegations of said complaint and also avers that in addition to the power and authority mentioned in said second allegation, this defendant was expressly authorized and empowered by its charter or articles of

incorporation, among other things, to take, purchase, acquire, hold, operate and maintain the rights and properties of water companies, associations or corporations, and to acquire, use, own, and operate all properties, franchises, rights, claims, privileges and everything belonging to that certain corporation known as the Artesian Hot and Cold Water Company, Limited, and to be successors in every respect of the said corporation; and defendant's said charter provided, that its period of existence should be fifty years from and after the date of its incorporation, or to and until the first day of September, A. D. 1950.

This defendant further avers that within three months from the time it commenced to do business in the State of Idaho, to wit, on the fourth day of September, 1901, it designated B. S. Howe, a person residing in Ada County, Idaho, the county in which its principal place of business in Idaho is conducted upon whom process issued by authority of, or under any law of said State, might be served, and on said last-named date, filed such designation in the office of the Secretary of State of the said State of Idaho and in the office of the Clerk of the District Court of said County of Ada; and defendant further avers that within three months after the taking effect of the act of the legislature of Idaho approved March 10, 1903, relating to foreign corporations, it filed with the county recorder of said county of Ada, a copy of its articles of incorporation, duly certified to by the Secretary of State of West Virginia, and also filed a copy thereof, duly certified by said county recorder with the Secretary of State of Idaho, and all

of said designations have ever since remained and now are in full force, and said copies have ever since remained and are now on file in said offices.

## II.

The defendant admits that the ordinance set forth in the third allegation of plaintiff's amended complaint was passed and adopted by said Boise City at the time and in the manner set forth in said allegation, but defendant denies that said ordinance was merely a license for an indefinite period to lay, construct or repair water-pipes in the streets and alleys of said city, but avers that said ordinance became, when acted upon by the grantees therein and their successors in interest, a franchise as hereinafter more fully set forth.

## III.

The defendant admits the fourth, fifth, sixth, seventh, eighth, ninth and tenth allegations of said complaint.

## IV.

The defendant denies that by reason of the enactment and approval of the ordinances mentioned in said complaint, or by its use or occupancy of the streets and alleys of Boise City with its waterworks system, it became or was on the first day of April, 1909, or at any other time, indebted to said Boise City in the sum of ten thousand one hundred thirty dollars, or in any sum whatever.

## V.

The defendant admits the demands made upon it by plaintiff, and its refusal to pay the amounts demanded, as alleged in the thirteenth allegation of



said complaint, but denies that it was indebted to plaintiff on the first day of April, 1909, or at any other time, in the sum of ten thousand one hundred thirty dollars, or in any sum whatever.

#### VI.

And further answering said complaint, this defendant avers, that on the tenth day of July, 1890, the Mayor and Common Council of plaintiff, under authority contained in its charter and the general laws of Idaho, duly passed an ordinance granting to the Artesian Water and Land Improvement Company, a corporation, and its successors and assigns, the privilege of laying down and maintaining water-pipes in the streets and alleys then laid out, or thereafter to be laid out and dedicated in said Boise City, a copy of which ordinance is hereto annexed, made a part of this answer, and marked Exhibit "A."

#### VII.

That the said Artesian Water and Land Improvement Company was a corporation duly organized under Chapter V of Title IV of the Civil Code of Idaho, relating to water and canal corporations, for the purpose of supplying said plaintiff and its inhabitants with water for public and family uses, and after the passage and approval of the ordinance mentioned in the sixth allegation hereof, the said Artesian Water and Land Improvement Company accepted the same and immediately proceeded thereunder and with due diligence, to sink artesian wells, construct reservoirs and lay pipes under and along plaintiff's streets and alleys and to supply plaintiff and its inhabitants with

pure, fresh water for municipal, domestic and irrigation purposes. That up to the time said last named company sold and conveyed its said waterworks and property to the Artesian Hot and Cold Water Company, Limited, as hereinafter alleged, it expended in the construction, extension and improvement thereof, over fifty thousand dollars.

### VIII.

That after the passage and approval of the ordinance set forth in the third paragraph of plaintiff's amended complaint, the said H. B. Eastman and B. M. Eastman, accepted the same and immediately proceeded thereunder and with due diligence, to construct a waterworks plant or system, consisting of artesian wells, and reservoirs, and laid mains and pipes under and along plaintiff's streets and alleys and supplied plaintiff and its inhabitants with pure mountain water in accordance with said ordinance. That up to the time said Eastmans sold and conveyed their said waterworks plant and rights to the Artesian Hot and Cold Water Company, Limited, as hereinafter alleged, they had expended in the construction thereof over twenty thousand dollars.

### IX.

That the Artesian Hot and Cold Water Company, Limited, was a corporation duly organized under said laws of the State of Idaho, relating to water and canal corporations, and was authorized by its articles of incorporation, to supply plaintiff and its inhabitants with water for municipal and domestic uses, and to purchase and acquire the waterworks, wells,



reservoirs, pipe-lines, properties, rights and franchises of the said Eastman Brothers and said Artesian Water and Land Improvement Company. That on the 28th day of March, 1891, the said Artesian Hot and Cold Water Company, Limited, purchased for a valuable consideration the said Eastman Brothers waterworks system and all property belonging thereto and all rights, privileges and franchises granted to said Eastmans under the ordinance set forth in the third allegation of said complaint, and that on the said 28th day of March, 1891, the said Artesian Hot and Cold Water Company, Limited, also purchased for a valuable consideration, the said waterworks system of said Artesian Water and Land Improvement Company, and all property belonging thereto and all rights, privileges and franchises granted to said company under the ordinance mentioned in the sixth allegation hereof, or by the laws of Idaho. That from and after the said 28th day of March, 1891, and until the sale of its waterworks and property in the year 1901, as alleged in the next allegation hereof, the said Artesian Hot and Cold Water Company, Limited, acting under authority of said ordinances and the said laws of Idaho, supplied plaintiff and its inhabitants with pure, fresh water for municipal, domestic and other useful purposes, in all respects in accordance with said ordinance and as required by said laws of Idaho. That during the said period of time plaintiff's population increased from about three thousand to about six thousand inhabitants and the area thereof was greatly enlarged by the laying out and platting of additions thereto,

which were settled upon and occupied, and during said period said company with the plaintiff's knowledge and consent, extended its pipe-lines under the streets and alleys of said city from time to time and supplied said additions with water to meet the demands therefor. That during said period said Company laid about fifteen miles of additional pipe-lines for cold water supply, constructed two wells, and one reservoir for cold water, erected a large steam pumping plant with a capacity of 3,000,000 gallons per day and made improvements to its cold water plant aggregating in cost, more than one hundred and ninety-two thousand dollars.

X.

That on the 28th day of August, 1901, defendant purchased for valuable consideration, the entire waterworks system and plant of said Artesian Hot and Cold Water Company, Limited, including all of its wells, reservoirs, pumping plants, pipe-lines, pipes, real and personal property of every nature, and also all of the rights, privileges and franchises which had been granted to it and to its predecessors in interest by the ordinances of plaintiff, hereinbefore referred to, and by the laws of Idaho. That at all times since said 28th day of August, 1901, this defendant has supplied to plaintiff and its inhabitants, by virtue of said ordinance and laws, and with plaintiff's knowledge, acquiescence and consent, pure, fresh water for municipal, domestic and other useful purposes in accordance with said ordinances and in full compliance therewith and with said laws of Idaho. That since said last named date, plain-



tiff's population has increased from about six thousand to over twenty-five thousand inhabitants, and this defendant, with plaintiff's knowledge, acquiescence and consent, has extended its cold water system to meet the growth of said city, and has laid over thirty miles of additional mains under the streets and alleys of said city, constructed numerous wells and galleries, acquired by condemnation proceedings additional land for the development of an increased water supply, installed four electric pumps of an aggregate capacity of six and one-half million gallons of water per day and has expended in the improvement and extension of said cold water system, an additional sum of more than one hundred and forty thousand dollars.

## XI.

That the supplying of water to said Boise City and its inhabitants by this defendant and its predecessors in interest and the use by them of its streets and alleys during the past twenty years has been under authority of said ordinances and the laws of Idaho, before referred to, and was and is an important public service of great benefit to said plaintiff and its inhabitants and was the consideration for which plaintiff granted said franchises, as aforesaid, and it was upon the faith of said grants and the reliance thereon that defendant and its grantors made the expenditures aforesaid, but defendant avers that at the time of the passage of said ordinance mentioned in the sixth allegation of said complaint, the said plaintiff and its mayor and common council claimed and have ever since claimed that said grants

to said Eastmans and said Artesian Water and Land Improvement Company were and are mere licenses which may be revoked or annulled at the will of said common council and that said common council may compel this defendant to discontinue its business of supplying water and of using said streets and alleys therefor, or subject it to the payment of said license fee or any other burdens for such privilege, and said common council enacted said license tax ordinance on this ground only, but this defendant avers that said grants, when accepted and acted upon by defendant and its grantors, as aforesaid, became and are franchises and binding contracts between plaintiff and defendant for the purposes aforesaid.

## XII.

That each and every year since this defendant and its grantors have been engaged in the business of supplying water, as aforesaid, their waterworks and all property, both real and personal owned by them in the Territory and State of Idaho, have been duly assessed for payment of all state and county, city and school taxes in like manner and to the same extent and in the same proportion to the value thereof, as all other property in said Boise City, and this defendant and its predecessors in interest have each and every year paid to the proper tax collector the full amount of each and all of the taxes so assessed against its property.

## XIII.

That on the 11th day of May, 1905, pursuant to section 2711 of the Revised Statutes of Idaho, and



the Act approved March 9th, 1905, amendatory thereof, two commissioners were appointed by the Mayor and Common Council of said plaintiff and two commissioners were thereafter appointed by this defendant for the purpose of fixing and determining the rates to be charged for water for domestic, municipal and other purposes in said Boise City. That said commissioners duly met and organized and continued in session over two months, and adopted a schedule of rates to be charged by defendant for all of said purposes, as required by said statute. That the plaintiff and defendant were represented by counsel before said commission and a large amount of evidence was introduced and the said commission carefully investigated the value of defendant's waterworks plant and reasonable operating expenses and deterioration thereof and fixed rates to be charged said city and its inhabitants for water at figures which were intended to yield to defendant, a net return of six per cent per annum, upon the then value of its plant, and defendant avers that said rates have not up to the present time and will not, in the future, to the best of defendant's information and belief, yield to defendant any greater net return.

That the said rates, adopted by said commission went into effect on the first day of August, 1905, and were accepted by plaintiff and defendant, and ever since have been and now are in full force and effect, and have never been repealed or modified, and, under the provisions of said statutes, will continue in force until new rates are established. That this defendant has at all times acquiesced in the rates fixed by

said commission, and regulated its charges in accordance therewith.

That the license tax levied by said plaintiff against this defendant under the ordinance mentioned in the sixth allegation of said complaint was not considered or contemplated by said commissioners in fixing said rates to be charged by this defendant, and the enforcement and collection of said license tax as prayed for in said complaint will reduce the defendant's net income to an amount considerably less than that fixed by said commission and which would be entirely inadequate, unreasonable and unfair and which would amount to confiscation of defendant's property.

#### XIV.

This defendant further avers that the Capital Water Company is a corporation organized under said laws of Idaho, relating to water and canal corporations, for the purpose of supplying said Boise City and its inhabitants with water, and said company is now and for a long time past has been engaged in the business of supplying water to plaintiff and its inhabitants for municipal, domestic and other useful purposes, under ordinances granted by plaintiff and under the said laws of Idaho, and said company is using and occupying the plaintiff's streets and alleys with its pipes and mains in the same manner and for the same purposes as this defendant, but said company is not required by the said plaintiff by ordinance or otherwise to pay any license or tax whatever for such privileges, and there are also numerous other individuals, associations and cor-



porations using plaintiff's streets and alleys for the purpose of supplying plaintiff and its inhabitants with electric lights and gas and for street railroad, telegraph and telephone purposes, none of whom are required by plaintiff to pay any license or tax for the privilege of carrying on their business or using said streets and alleys.

### XV.

This defendant further avers that by reason of the premises, the said ordinance mentioned in the sixth allegation of said complaint, as sought to be enforced by said plaintiff in this action, will impair and destroy the said franchises and contract rights of this defendant and the obligations thereof, and is therefore in contravention of the provisions of article I, section 10, of the Constitution of the United States, forbidding any legislation impairing the obligation of contracts, and is invalid; and that the enforcement of said ordinance will deprive this defendant of its property without due process of law and deny to this defendant the equal protection of the laws, in violation of the Federal Constitution of the Fourteenth Amendment thereto, and that said ordinance amounts to double taxation of defendant's property, and is unreasonable and oppressive and is in violation of the constitution and laws of the State of Idaho.

Wherefore, this defendant prays that it may be hence dismissed with its costs and disbursements incurred herein.

RICHARD H. JOHNSON and  
EDGAR WILSON,

Attorneys for Defendant, Residence, Boise, Idaho.

RICHARD Z. JOHNSON,

Of Counsel.

State of Idaho,

County of Ada,—ss.

Benjamin S. Howe, being first duly sworn, deposes and says that he is an officer, to wit, the Secretary of the above-named defendant and makes this verification for and on behalf of said defendant. That he has read the foregoing answer and knows the contents thereof. That the same is true of his own knowledge except as to the matters therein stated to be on his information or belief, and as to those matters that he believes it to be true.

[Seal]

B. S. HOWE.

Subscribed and sworn to before me this 14th day of May, 1909.

RICHARD H. JOHNSON,

Notary Public.

**Exhibit "A" [to Answer to Amended Complaint].**

An Ordinance Granting to the Artesian Water and Land Improvement Company, the Right to Lay Water-pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, do ordain:

Section 1. The privilege of laying down and maintaining water-pipes in the streets and alleys



now laid out, or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.

Section 2. All water-pipes placed in said streets and alleys shall be laid down in workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

Section 3. This Ordinance shall take effect and be in force from and after its passage.

Approved July 10, 1890.

I hereby acknowledge service of a copy of the foregoing Answer to Amended Complaint this 18th day of May, 1909.

F. B. KINYON,

City Attorney and Attorney for Plaintiff.

[Endorsed]: Filed May 18, 1909. A. L. Richardson, Clerk.

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*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the State  
of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED (a Corpo-  
ration),

Defendant.

**Motion to Strike.**

Comes plaintiff and moves to strike from the answer of the defendant herein the following:

I.

To strike from paragraph I of said answer all that portion thereof beginning with the word "and," at the end of line one and ending with the words, "September, A. D. 1950," at the end of line fourteen on the first page thereof, for the following reasons:

*a.* For the reason that said allegations are irrelevant and have no substantial relation to the question in controversy, and can in no event affect the decision of the Court.

*b.* That in the particulars set forth under *a* said matter is redundant.

II.

To strike from said answer that portion of paragraph VII, beginning in line thirteen with the words "that up to the time," and thence to the end of said paragraph VII, for the reasons set forth in paragraph I hereof, reference to which is hereby made.

III.

To strike from paragraph VIII of said answer that portion thereof beginning with the words "That up to the time," in line nine thereof, and thence to the end of the paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

IV.

To strike from paragraph IX of said answer that portion thereof beginning in line thirty of said para-

graph being line seven on page six of said answer, with the words, "that during the said," and thence to the end of the paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

V.

To strike from said paragraph IX of said answer that portion thereof beginning in line thirty-eight thereof, and being line fifteen on page six, with the words, "that during said period," and thence to the end of said paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

VI.

To strike from paragraph X of said answer that portion thereof beginning with line fifteen, being line eight on page seven, with the words, "that since said last named," and thence to the end of the said paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

VII.

To strike from said answer the whole of paragraph XIII, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

VIII.

To strike from said answer the whole of paragraph XIV, for the reasons and upon the grounds set forth in the first paragraph hereof, reference to which is hereby made.

Wherefore, etc.,

F. B. KINYON,  
Attorney for Plaintiff,  
Residing at Boise, Idaho.



Service of the within and foregoing Motion to Strike, with copy, admitted this 17th day of June, 1909.

EDGAR WILSON and  
JOHNSON & JOHNSON,  
Attorneys for Defendant.

[Endorsed]: Filed June 17th, 1909. A. L. Richardson, Clerk.

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*In the Circuit Court of the United States for the District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT and COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

**Demurrer.**

Comes the plaintiff and without waiving its motion to strike filed herein, files this its demurrer to the answer of the defendant herein, and for ground thereof alleges:

I.

That said answer does not state facts sufficient to constitute a defense.

II.

That said answer is uncertain in that it cannot be determined therefrom whether the clause "Laws of



the State of Idaho," as used in paragraphs 9, 10 11 and 14, refers to Title Four of the Revised Codes relating to corporations or whether it refers to Section 2711 of the Revised Statutes of Idaho, and the Act approved March 9, 1905, amendatory thereof, or whether it refers to Chapter Five of Title Four of the Civil Code of Idaho relating to Water and Canal corporations, or whether the same refers to still other Laws of the State of Idaho.

### III.

That said answer is ambiguous for the reasons assigned in paragraph II, hereof relating to uncertainty.

### IV.

That said answer is unintelligible for the reasons assigned in paragraph II, hereof relating to uncertainty.

Wherefore, etc.,

F. B. KINYON,  
Attorney for Plaintiff,  
Residing at Boise, Idaho.

Service of the within demurrer, with copy admitted this 17th day of June, 1909.

EDGAR WILSON and  
JOHNSON & JOHNSON,  
Attorneys for Defendant.

[Endorsed]: Filed June 17, 1909. A. L. Richardson, Clerk.

**Ordinance No. 699.**

By Councilman DAVIS.

AN ORDINANCE ORDERING AND REQUIRING THE PROPER OFFICERS OF BOISE CITY, IDAHO, TO INSTITUTE AN ACTION FORTHWITH IN ANY COURT OF COMPETENT JURISDICTION FOR THE ENFORCEMENT AND COLLECTION OF ALL SUMS OR AMOUNTS OF MONEY DUE SAID BOISE CITY UNDER THE PROVISIONS OF ORDINANCE 678, ENACTED AND APPROVED BY SAID CITY ON JUNE 7, 1906.

BOISE CITY DOES ORDAIN AS FOLLOWS:

Sec. 1. That the proper officers of Boise City, Idaho, are hereby instructed, required and ordered to institute forthwith an action for and on behalf of and in the name of said Boise City in any court of competent jurisdiction for the enforcement and collection of all sums or amounts of money due said Boise City, under provisions Ordinance 678, enacted and approved by said Boise City, on June 7, 1906.

Sec. 2. This Ordinance shall take effect and be in force from and after its passage and approval.

PASSED by the Common Council of Boise City, Idaho, this 6th day of December, 1906.

APPROVED by the Mayor of Boise City, Idaho, this 6th day of December, 1906.

APPROVED  
JAS. A. PINNEY,  
Mayor.

Attest: E. L. SAVIDGE,  
City Clerk.

I, Emily L. Savidge, City Clerk of Boise, Idaho, hereby certify that the above and foregoing is a true and correct copy of original Ordinance 699, passed the common council December 6, 1906, approved by the Mayor December 6th, 1906, and of record and on file in this office.

Given under my hand and the seal of Boise City, Idaho, this 27th day of December, 1906.

[Seal]

E. L. SAVIDGE,  
City Clerk.

[Endorsed]: Filed June 30, 1909. A. L. Richardson, Clerk.

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*In the Circuit Court of the United States for the District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT and COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

**Stipulation [Filed October 23, 1909 ] of Facts.**

It is hereby stipulated by and between the parties to the above-entitled action by their attorneys herein that the following shall constitute a statement of the facts agreed upon in said action to be used on the final trial hereof before the court, a jury being expressly waived herein.



1. The first, second, fourth, fifth, sixth, seventh, eighth, ninth and tenth allegations of plaintiff's amended complaint are admitted.

2. All of the third allegations of said complaint is admitted except that portion thereof on the fourth and fifth lines of said allegation, which states, that said ordinance is "a license for an indefinite period."

3. That the first, seventh and eighth allegation of defendant's answer to said amended complaint are hereby admitted to be true.

4. That the sixth allegation of defendant's said answer, including Exhibit "A" therein referred to, is hereby admitted to be true, but plaintiff does not admit that the ordinances referred to in said allegation were passed by the common council of plaintiff under authority of the general laws of Idaho.

5. That the ninth and tenth allegations of defendant's said answer are hereby admitted to be true, but plaintiff does not admit that the ordinances mentioned in said allegations and in the said sixth allegation are franchises or that defendant furnished such water under authority of or in accordance with the laws of Idaho, or that such laws apply to the furnishing of water in Boise City, but plaintiff admits that the defendant and its predecessors in interest in furnishing such water complied with all conditions and requirements contained in such laws, and plaintiff reserves its objection as to the admissibility of the facts set forth in the said ninth and tenth allegations on the ground that they are irrelevant, incompetent and immaterial and no defense to the action.

6. As to the eleventh allegation of said answer, plaintiff admits that after the passage of said ordinances purporting to give the rights to use the streets and alleys of said city, the predecessors of said defendant proceeded to lay their pipes and supply said water, and that defendant and its said predecessors in interest have ever since continued so to do by reason of the passage of said ordinances, and that since the passage of said ordinance mentioned in the sixth allegation of said complaint said plaintiff and its common council have claimed that said ordinances were and are revocable licenses, as alleged in said eleventh allegation of said answer.

7. The twelfth allegation of said answer is hereby admitted to be true, but plaintiff reserves the objection that the facts therein stated are immaterial, irrelevant and incompetent and not a defense to the action.

8. As to the thirteenth allegation of said answer, plaintiff admits the appointment of the commissioners, and that they met and adopted a schedule of rates to be charged by defendant for all purposes mentioned in said allegation, and that said rates were intended to yield the net return of six per cent mentioned therein and that they do not now and will not yield a greater return, and that the said rates so fixed by said commission were after August 1, 1905, and still are charged by defendant for water, and that defendant has at all times acquiesced in the rates so fixed and regulated its charges accordingly, and that said license tax levied by plaintiff was not considered or contemplated by said commission in fixing said



rates, and that its enforcement will reduce defendant's net income to an amount considerably less than that fixed by said commission, as set forth in said thirteenth allegation of said answer, but plaintiff does not admit that the statutes referred to in said allegation have application to the appointment of commissioners in said Boise City, or that they could be legally appointed pursuant to said statutes.

9. That the fourteenth allegation of said answer is hereby admitted to be true and it is stipulated that the franchise to the Capital Water Company mentioned therein is by its terms limited to endure for a period of fifty years, and plaintiff reserves its legal objection that said franchise was not granted under the laws of Idaho therein referred to, and that the facts stated in said thirteenth and fourteenth allegations are irrelevant, incompetent and immaterial and not a defense to the action.

10. It is admitted that the said Eastman Brothers and the said Artesian Water and Land Improvement Company and said defendant paid no pecuniary consideration for the grants made to them of the use of said streets and alleys, and that no pecuniary consideration therefor was ever demanded or required by said plaintiff therefore, prior to the passage of said Ordinance No. 678, which is hereto attached, marked Exhibit 1, and is admitted in evidence.

11. It is admitted that plaintiff has made due and proper demand upon defendant for the payment of



the amount prayed for in said complaint and that defendant has paid no part thereof.

Dated October 22, 1909.

F. B. KINYON and

CAVANAH & BLAKE,

Attorneys for Plaintiff.

JOHNSON & JOHNSON,

Attorneys for Defendant.

[Endorsed]: Filed October 23, 1909. A. L. Richardson, Clerk.

**Exhibit No. 1.**

ORDINANCE #678.

By Councilman Davis.

AN ORDINANCE REQUIRING THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, A PRIVATE CORPORATION, ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF WEST VIRGINIA, TO PAY TO BOISE CITY A MUNICIPAL CORPORATION OF THE STATE OF IDAHO ON THE FIRST DAY OF EACH AND EVERY MONTH, A MONTHLY LICENSE OF \$300.-00 FOR THE USE AND OCCUPANCY OF THE STREETS AND ALLEYS OF SAID BOISE CITY, IDAHO, IN FURNISHING WATER TO THE RESIDENTS OF SAID CITY.

WHEREAS, Boise City is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and,

WHEREAS, the Boise Artesian Hot and Cold Water Company is a private corporation organized, existing and operating under the laws of the State of West Virginia, and

WHEREAS, said Boise City on the 3d day of October, 1899, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said Company to the residents of said City for profit, and

WHEREAS, The said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks.

**NOW, THEREFORE, BOISE CITY DOES ORDAIN AS FOLLOWS:**

**SECTION 1. THAT,** The Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1899, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month, a monthly license of \$300.00 for the privilege granted by said ordinance of October 3, 1899, to lay and repair water-pipes in the streets and alleys of said City through which water

is being furnished to the inhabitants of said Boise City by said Company.

SECTION 2. THAT demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of \$300.00 required by Section 1 of this Ordinance.

SECTION 3. THAT, the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot and Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

SECTION 4. THAT nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid Ordinance of October 3, 1899.

SECTION 5. THIS Ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31st day of May, 1906.

Vetoed by the Mayor June 2, 1906.

Passed over the Mayor's veto June 7, 1906, by a vote of 8 ayes; 3 noes.

Attest:

EMILY L. SAVIDGE,  
City Clerk.

I, E. L. Savidge, City Clerk, hereby certify that the within and foregoing is a true and correct copy of Ordinance No. 678 passed by the common Council of Boise City, the 31st day of May, 1906, vetoed by



the Mayor the 2d day of June, 1906, passed over the Mayor's veto June 7th, 1906, and of record and on file in this office.

Given under my hand and the seal of Boise City, this 26th day of July, 1906.

[Seal]

EMILY L. SAVIDGE,  
City Clerk.

[Endorsed]: Filed June 30, 1909. A. L. Richardson, Clerk.

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*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the  
State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED (a Cor-  
poration),

Defendant.

**Stipulation [Re Submission of Demurrer, etc.].**

It is hereby stipulated by and between the parties to the above-entitled action, through their attorneys herein:

1. That the demurrer to defendant's answer and the motion to strike out parts of said answer heretofore filed may be argued and submitted together at the hearing of said cause in Portland, Oregon, on July 12th, 1909, before Honorable William B. Gilbert, United States Circuit Judge for the Ninth

Judicial Circuit, the court having heretofore expressed its approval.

2. That the copy of the Ordinance of said Boise City No. 678, mentioned in paragraph VI of plaintiff's amended complaint, certified by the City Clerk of said Boise City on the 26th day of June, 1906, may be filed herein and used on the trial of this action, and copies of any other ordinances so certified, that counsel may desire to introduce, may be so filed in evidence.

3. That the ordinance granted by plaintiff to the Capital Water Company, mentioned in paragraph XIV of defendant's answer, was specified to continue for fifty years from the time it was passed by the city council.

F. B. KINYON,

Attorney for Plaintiff.

EDGAR WILSON and

JOHNSON & JOHNSON,

Attorneys for Defendant.

[Endorsed]: Filed June 30, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the  
State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED (a Cor-  
poration),

Defendant.

**Opinion [Filed July 29, 1909].**

FRANK B. KINYON, for the Plaintiff,  
JOHNSON & JOHNSON and EDGAR WIL-  
SON, for the Defendant.

The plaintiff brings an action against the defend-  
ant alleging that on October 3, 1899, the plaintiff, by  
its mayor and common council, adopted an ordinance  
which provides as follows: "Section 1. H. B. East-  
man and B. M. Eastman and their successors in in-  
terest in their waterworks for the supply of moun-  
tain water to the residents of Boise City, are hereby  
authorized to lay and repair their water-pipes in,  
through, along and across the streets and alleys of  
Boise City, under the surface thereof; but they shall,  
at all times, restore and leave all streets and alleys,  
in, through, along and across which they may lay  
such pipes, in as good condition as they shall find the  
same, and shall, at all times, promptly repair all  
damage done by them or their pipes, or by water es-  
caping therefrom"; that the ordinance granted a



license for an indefinite period, and that it was accepted by the grantees thereof; that the defendant became the successor in interest of the said H. B. and B. M. Eastman; that the defendant and its predecessors in interest are now, and ever since October 3, 1889, have been using the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff, and the residents of said city; that the plaintiff on June 7, 1906, enacted and approved an ordinance requiring the said defendant to pay plaintiff on the first day of each month, a monthly license of \$300, for the use and occupancy of the streets and alleys of said city by the defendant in the sale and delivery of water to the plaintiff and the inhabitants of said city, and for the privilege granted by said ordinance of October 3, 1889; that demand has been made upon the defendant for the payment of said monthly license, but payment has been refused. Judgment was demanded for the sum of \$10,130. The defendant answered, alleging that on July 10, 1890, the mayor and common council of plaintiff duly passed an ordinance granting to the Artesian Water and Land Improvement Company, a corporation and its successors and assigns, the privilege of laying down and maintaining water-pipes in the streets and alleys then laid out or thereafter to be laid out, and dedicated in said Boise City; that said corporation accepted the same and immediately proceeded thereunder with due diligence to sink artesian wells, construct reservoirs, and lay pipes under and along the streets and alleys of said city to supply it and its inhabitants with water, and therein expended over

\$50,000; that the said H. B. and B. M. Eastman accepted the ordinance of October 3, 1889, laid their water mains and pipes under and along the streets of said city and up to the time they conveyed their plant to the defendant, they had expended thereon the sum of \$20,000; that on March 28, 1891, the Artesian Hot and Cold Water Company, Limited, became the owner by purchase of the rights of said Eastman Brothers and of the said Artesian Water and Land Improvement Company, and since said date has supplied water to said city and its inhabitants and has improved its plant at an expense of \$192,000; that on August 28, 1901, the defendant became the owner by purchase of the entire waterworks system and plant of the Artesian Hot and Cold Water Company, Limited, and since said date has supplied the plaintiff and its inhabitants with water and therein has expended \$140,000, and the defendant alleges that the plaintiff and its mayor and common council have claimed and are claiming that the defendant is a mere licensee under a license which may be revoked or annulled at the will of said common council, and the defendant avers that said ordinances when accepted and acted upon by the defendant and its grantors became and are franchises and binding contracts between the plaintiff and defendant; that the defendant during the whole time of its engagement in the business of supplying water, has paid its due proportion of taxes, State, county, city and school taxes upon all its property in said city, and has charged and received water rates in accordance with the rate duly established by commission-



ers appointed under section 2711 of the Revised Statutes of Idaho, and the Act of March 9, 1905. To the answer the plaintiff demurs on the ground that the facts stated therein constitute no defense to the cause of action alleged in the complaint.

GILBERT, Circuit Judge, after stating the case.

The Circuit Court of Appeals for this Circuit had occasion to construe the ordinance of October 3, 1889, granting to the Eastman Brothers and their successors in interest in their waterworks, authority to lay and repair their water-pipes in and through the streets and alleys of Boise City, and held that since no term was specified in the ordinance for the enjoyment of the privilege so granted, it was a grant of a license only, legalizing such use of the streets for supplying water until such time as the city might see fit to terminate the privilege. *Boise City Artesian Hot and Cold Water Co. v. Boise City*, 123 Fed. 232. This was held under the doctrine, sustained by the decided weight of authority, that a municipal corporation has no power to grant a franchise in perpetuity unless it is expressly authorized by the legislature. 28 Cyc. 875; *Logansport Ry. Co. v. Logansport*, 114 Fed. 688; *Detroit v. Detroit City R. Co.*, 56 Fed. 867; *Birmingham etc. Street Ry. Co. v. Birmingham Street R. Co.*, 79 Ala. 465. Section 2710 of the Revised Statutes of Idaho, 1887, referring to water and canal corporations, and providing that no contract or grant must be made for a term exceeding 50 years, was not deemed applicable to the case for the reason that the Eastman ordinance was a grant of a privilege to individuals and not to a cor-



poration. In construing that section of the statutes, the Supreme Court of Idaho in *Jack v. Village of Grangeville*, 9 Idaho, 291, held that it had no application to individuals or natural persons. See, also, *Santa Ana Water Co. v. Town of San Buena Ventura*, 56 Fed. 339. But in the present case, a different question is presented, for the Court is called upon to construe the ordinance of July 10, 1890, granting to the Artesian Water and Land Improvement Company, a corporation, its successors or assigns, "The privilege of laying down and maintaining water-pipes in the streets and alleys now laid out or hereafter to be laid out and dedicated to Boise City." This ordinance is not more inclusive than the ordinance granting the privilege to Eastman Brothers, the predecessors in interest of the Artesian Water and Land Improvement Company, and, like that ordinance, it contains no expression of the will of the common council as to the term or duration of the granted right. The defendant contends that the omission is to be filled by reading into the ordinance the prohibition of section 2710 of the Revised Statutes that no contract or grant to a corporation "must be made for a term exceeding 50 years," and that thereby it is made a franchise for 50 years. This is the crucial question in the case, upon the answer to which depends the disposition of the demurrer.

There is a line of cases which hold that where a municipal corporation grants a franchise or enters into a contract permitting the use of its streets for a fixed period longer than that which is allowed by law, the contract is wholly void as ultra vires, and

will not be sustained for any period whatever. Thus in *Sullivan v. Bailey*, 83 N. W. 996, the Supreme Court of Michigan held that under a city charter conferring power on the common council to contract to supply its inhabitants with water and light, and granting the use of the streets for those purposes for a period not exceeding ten years, the common council cannot grant a franchise for the use of the streets for a longer period than ten years for those purposes, and that the grant of a franchise for thirty years was void. So in *Gaslight & Coke Co. v. City of New Albany*, 156 Ind. 406, under a statute which authorized the municipal corporation to make contracts for lighting its streets for a term not exceeding ten years, a franchise given by ordinance for a period of twenty years was held to be wholly invalid, and not to be allowed to stand for the ten years authorized by statute. Said the Court: "The contract here with respect to duration involves but a single proposition, a single and specific term of twenty-three years, which, from its indivisible nature, must either stand or fall as an entirety." The same was held in *City of Wellston v. Morgan*, 59 Ohio St. 147; *Town of Kirkwood v. Meremac Highlands Co.*, 94 Mo. App. 637; *City of Somerset v. Smith (Kentucky)*, 49 S. W. 456; *State ex rel. Davis v. Harrison*, 46 N. J. L. 79; *Humphreys v. Mayor of Bayonne*, 55 N. J. L. and *Manhattan Trust Co. v. City of Dayton*, 8 C. C. A. 140.

But it would seem that, upon principle, there is a distinction to be observed between cases where the municipality grants a franchise for a fixed period of



time in excess of that which the law permits, and cases where it grants a franchise for an indefinite period under a law which places a limit upon the life of such a franchise. In the first class of cases, there must be imputed to the municipal authorities and the contracting parties a violation of the law, and there is good ground for saying that the contract is ultra vires and wholly void, and that a Court may not lop off the excess of time so granted and hold the franchise good for the term for which it might lawfully have been given. In the second class of cases, it is reasonable to hold that there was absence of intention to disregard the law, that the franchise was granted in view of the existing statutory limitation fixed upon its life, and that the ordinance granting it being silent as to its duration, the omission is to be supplied by a reference to the statute. It is true that in *Blaschko v. Wurster*, 156 N. Y. 447, the Court refused to sustain as valid for the period limited by the statute a grant of a franchise for an indefinite time. In that case, the charter provided that no franchises or right to use the streets of the city could be granted for a longer period than twenty-five years. It was held that a resolution of the aldermen granting consent to a railroad company to operate in certain streets without any limitation as to time was not a valid exercise of the power to grant consent for twenty-five years, and hence was not good as a consent for twenty-five years, but was void. But in *People ex rel. Flatbush Gas Co. v. Coler et al.*, 103 N. Y. S. 590, the court declined to follow the *Blaschko* case, and held that under the



Greater New York charter forbidding the grant of any franchise to use the streets for a period longer than twenty-five years, where a company has laid electric wires and furnished light to the city and others for ten years under a contract with the commissioners of parks giving it the right to do so, without limiting the time, the contract is valid for the exercise of the right for twenty-five years from its date. Referring to the decision in *Blaschko v. Wurster*, the court said that the franchises attempted to be granted there were clearly an attempt to evade the provisions of the Greater New York charter, which was about to go into effect, that the circumstances of the granting evidenced bad faith, and a deliberate breach of duty on the part of the authorities, and that for these reasons the contracts had been held void, and the court had refused to consider the grant good even for twenty-five years. "Like reasons, however," said the Court, "cannot apply here where the Gas Company has been operating under some kind of a franchise for ten years with the consent and approval, and for the benefit of the city." The Court of Appeals, 190 N. Y. 268, reversed the decision in *People ex rel. Flatbush Co. v. Coler*, solely on the ground that the common council and not the commissioner of public parks was the proper authority to give consent to the use of the streets. A case directly in point is *Old Colony Trust Co. v. City of Wichita*, 123 Fed. 762, affirmed by the Circuit Court of Appeals for the Eighth Circuit in 132 Fed. 641. In that case one of the questions involved was the length of the life of an ordi-

nance granting to a telephone company the right to maintain its poles and wires in the streets of a city, no term being stated in the ordinance. The Court held, and it seems to have been assumed by counsel for both parties, that the life of the privilege granted was twenty years. This was held under the provisions of General Statutes of Kansas, 1889, section 555, wherein, in defining the general powers of the mayor and council of incorporated cities, the legislature coupled the grant of power to permit the use of streets for water, light and other purposes, with the proviso that no franchise or right of way or privilege of any character should be granted for a longer period than twenty years.

It is not reasonable to suppose that the City of Boise intended to grant as a mere license, subject to recall at any time, a privilege such as that which is embodied in the ordinance under consideration, or that the grantee thereof would have accepted it on that understanding, or on that understanding would have incurred the expense of installing its water plant. The conclusion that it was in law such a license, should be reached by a Court only when confronted with the alternative of choosing between the two constructions, one that it is a mere license, the other that it is a grant in perpetuity. It was in the face of that alternative that the Court in *Boise City Artesian Hot and Cold Water Co. v. Boise City* held that the grant of the *Eastman Brothers* must, in law be deemed a license. Upon a careful consideration of the question here involved, and the authorities applicable thereto, and in view of the fact that the privilege so



granted is not exclusive and does not stand in the way of the city's granting like privileges to others, or instituting its own water plant and supply, I am inclined to the opinion that the ordinance under consideration, having been accepted and acted upon by the grantee and its successors, creates a franchise for fifty years, which may not be impaired by the imposition of a license tax upon the use of the streets for the purposes for which it was so created, and that the demurrer should be overruled.

[Endorsed]: Filed, July 29, 1909. A. L. Richardson, Clerk.

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*In the Circuit Court of the United States for the District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

**Order [on Motion to Strike].**

This cause having been submitted upon a motion to strike out portions of the answer, and upon a demurrer to the answer, the plaintiff appearing by Frank B. Kinyon, its attorney, and the defendant appearing by Johnson & Johnson and Edgar Wilson, its attorneys, the Court being now fully advised in the premises,—



It is ordered, that the said motion be allowed as to that portion thereof directed to paragraphs 8 and 14 of said answer, and as to the remainder thereof disallowed, and that the demurrer be, and is hereby overruled.

WM. B. GILBERT,  
Circuit Judge.

[Endorsed]: Filed July 29, 1909. A. L. Richardson, Clerk.

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*In the Circuit Court of the United States for the District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LTD. (a Corporation),  
Defendant.

**Opinion [Filed April 1, 1910].**

F. B. KINYON, City Attorney of Boise City,  
CAVANAUGH & BLAKE, for the Plaintiff.

JOHNSON & JOHNSON, for the Defendant.

GILBERT, Circuit Judge:

By the stipulation of the parties, this case is submitted for trial without a jury, and for judgment upon the pleadings and an agreed statement of the facts. The action is brought by the plaintiff to recover certain license fees charged against the defendant for the use and occupancy of the streets and alleys of the city in the sale and delivery of water to

the plaintiff and its inhabitants, under an ordinance approved on June 7, 1906. The defendant denied its liability on the ground that on July 10, 1890, the mayor and common council of the plaintiff had, by ordinance, granted to the defendant's predecessor in interest, a corporation, and to its successors and assigns, the privilege and franchise of laying down and maintaining water-pipes in the streets and alleys then laid or thereafter to be laid out and dedicated in the city, and that the franchise had been accepted and acted upon and used in compliance with its terms, and among other matters pleaded in defense, the defendant alleged that on May 11, 1905, pursuant to section 2711 of the Revised Statutes of Idaho, and the Act approved March 6, 1905, amendatory thereof, two commissioners were appointed by the mayor and common council of the plaintiff, and two commissioners were thereafter appointed by the defendant for the purpose of fixing and determining the rates to be charged for water for domestic, municipal and other purposes in said Boise City. That said commissioners duly met and organized and adopted a schedule of rates to be charged by the defendant for all of said purposes as required by said statute, which schedule was adopted upon consideration and investigation of the value of the defendant's waterworks plant and reasonable operating expenses and deterioration thereof, as fixed rates to be charged the said city and its inhabitants at figures which were intended to yield to the defendant a net return of six per cent per annum upon the then value of its plant, and that said rates have not, up to the present time,

and will not in the future, to the best of defendant's information and belief, yield the defendant any greater net return. That the said rates so adopted went into effect on August 1, 1905, and were accepted by both plaintiff and defendant, and ever since have been and now are in full force and effect, and will continue in force until new rates are established, and that the defendant has at all times acquiesced in said rates. A demurrer to the answer was interposed on the ground that the right so granted was a license merely, revokable at the will of the grantor, for the reason that no period for its duration had been expressed in the ordinance, and that the facts stated in the answer constituted no defense to the cause of action alleged in the complaint. It was held upon the demurrer that section 2710 of the Revised Statutes of Idaho, 1887, referring to water and canal corporations, and providing in general terms that "no contract or grant must be made for a term exceeding fifty years," was to be referred to as determining the length of life of the franchise, and that the term of fifty years so fixed, should be read into the ordinance as a part thereof.

The plaintiff now directs attention to a decision of the Supreme Court of Idaho of date February 18, 1909, *Boise City Nat. Bank v. Boise City*, 100 Pac. 93, the effect of which, it is said, is to hold that a general statute of the state, such as that embodied in section 2710 has no application to a city incorporated under a special charter. The question involved in that case was whether the act of the legislature of February 24, 1905, which was an act to provide for



the issuance of bonds for improvements of streets and laying of sewers in incorporated cities, towns and villages, and for the payment of costs of such improvement and sewers, by installments, and making the provisions thereof applicable to cities, towns and villages which have levied special assessments for improvements or for laying sewers, was a statute which in any way controlled or related to the action of the officials of Boise City in issuing local improvement bonds for sewer districts. It was held that it did not, and that the action of the officials of Boise in issuing such bonds was controlled only by the special charter of Boise City, as amended on February 22, 1907, wherein was provided a complete system for building sewers, assessing the property benefited, and collecting from the property owners the cost thereof, which method the act declared should be exclusive. And the Court held that, while the Act of 1907, contained no repeal of any of the provisions of the Act of 1905, and was not as full and complete as it ought to be in regard to the making of improvements, and the Act of 1905 was not inconsistent with it, but merely went further and gave additional powers, yet the omission was nevertheless intentional, that the provisions of the general law of 1905 had no application to the new charter, but applied to cities and towns organized under a general law and not to those organized under special charters, that the State constitution contemplates that special charter shall be amended by special acts only, and that the general laws relating to the local government of a city cannot be made to apply to Boise City with-

out the consent of a majority of the electors. I am unable to see that the decision has any appreciable bearing upon the question here involved. Section 2710 of the Revised Statutes of 1887 is not a statute defining the powers of incorporated cities, towns and villages, but is a general statute of the state, declaring a rule of public policy with reference to all canal and water corporations of the state, limiting the life of the contracts which may be made with them for the supply of water for the use of incorporated towns and cities of the state. It is found in the statutes under the title "Corporations," a title which deals with the powers and the regulation of railroad companies, telegraph and telephone companies insurance companies, surety and fidelity companies, banking corporations, gas corporations, and all other kinds of incorporated companies. It declares: "No corporation formed to supply any city or town with water, must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years." The State constitution provides that the right to collect rates or compensation for the use of water supplied to any county, city or town, or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of, and in the manner prescribed by law." It cannot



be doubted that section 2710 applies to all water companies in their contracts with all municipal corporations, whether the latter are incorporated under the general law or under a special charter, and contains the whole expression of the legislative will on the subject. It expressly limits the power of all municipal corporations to deal with water companies. No water company may furnish water to a town or city, under whatever authority incorporated, unless previously authorized by an ordinance, or a contract, and to no such corporation can any exclusive right be granted, or any right for a longer period than fifty years. No legislation on the subjects so referred to is found in the general laws providing for the incorporation of towns and cities or in the charter of Boise City. Section 2711 provides that a water company receiving and accepting the privileges conferred by section 2710, shall furnish a city or town water for fire purposes and other great necessities, free. In the *City of Boise v. Artesian Hot & Cold Water Co.*, 4 Idaho, 351, a suit brought under sections 2711 and 2712, to compel the defendant to furnish the city with free water for fire purposes, the court expressly recognized the applicability of section 2710 to the City of Boise, and held that the plaintiff's complaint must set forth substantially the ordinance or contract with the city, permitting the company to furnish the water, and regulating the manner thereof as provided in that section. The decision, in brief, distinctly holds that the provisions of the chapter referring to water and canal corporations is appli-



cable to the city of Boise, and I deem it a controlling decision upon the question here under consideration.

Judgment will be rendered for the defendant.

[Endorsed]: Filed April 1, 1910. A. L. Richardson, Clerk.

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*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the State  
of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WA-  
TER COMPANY LIMITED (a Corpora-  
tion),

Defendant.

**Findings of Fact and Conclusions of Law.**

This action coming regularly on for trial, before the Court, without the intervention of a jury, a stipulation in writing waiving a jury having been filed with the clerk by the attorneys for the respective parties, F. B. Kinyon, Esq., City Attorney of plaintiff and Messrs. Cavanah and Blake, appearing as the attorneys for the plaintiff, and Messrs. Johnson & Johnson, appearing as attorneys for the defendant, and stipulations containing an agreed statement of the facts having been filed and the case having been argued by the attorneys for the respective parties and submitted to the court for judgment upon the stipulations of fact and the pleadings and the Court, having duly considered the same, and being fully

advised in the premises and having heretofore, on the first day of April 1910, rendered and filed its opinion in writing herein:

Now, in accordance therewith the Court hereby makes and renders its decision, finding the following facts and conclusions of law herein:—

### **Findings of Fact.**

#### I.

The plaintiff, Boise City, is now, and at all times herein mentioned, was, a municipal corporation within Ada County, Idaho, created by and existing under the laws of Idaho and operating under a special charter, granted by the Legislature of the Territory of Idaho in the year 1863, and subsequent amendments thereto.

#### II.

That the defendant is a private corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business at Boise City, Ada County, State of Idaho, and is authorized and empowered by its articles of incorporation to carry on and conduct a waterworks system and to sell and rent water to the inhabitants of the said Boise City, and to take, purchase, acquire, hold, operate and maintain rights and privileges of water companies, associations or corporations, and to acquire, use, own and operate all properties, franchises, rights, claims, privileges and everything belonging to that certain corporation known as the Artesian Hot and Cold Water Company, Limited, and to be the successors in every respect of said corporation, and its charter provides that its period of

existence shall be fifty years from and after the date of its incorporation, or to and until September 1, 1950.

That the defendant, within three months from the time it commenced to do business in the State of Idaho, to wit, on the 4th day of September, 1901, designated B. S. Howe, a person residing in Ada County, Idaho, the County in which its principal place of business in Idaho is conducted, upon whom process issued by authority of or under any law of said State, might be served, and on said last named date filed such designation in the office of the Secretary of State of Idaho and in the office of the Clerk of the District Court of said County of Ada, and within three months after taking effect of the act of the Legislature of Idaho, approved March 10, 1903, relating to foreign corporations, it filed with the County Recorder of said County of Ada, a copy of its articles of incorporation, duly certified to by the Secretary of State of West Virginia, and also filed a copy thereof, duly certified by said County Recorder, with the Secretary of State of Idaho, and all of said designations have ever since remained and now are in full force and said copies have ever since remained and are now on file in said offices.

### III.

That on the 3d day of October, 1889, said plaintiff, Boise City, by its Mayor and Common Council, passed and adopted the following ordinance, to wit: "An Ordinance Granting Eastman Brothers the Right to Lay Water-pipes in Boise City.



The Mayor and Common Council of Boise City, Idaho, ordain:

Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipes, in, through and along and across the streets and alleys of Boise City, under the surface thereof; but they shall, at all times, restore and leave all streets and alleys in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall, at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom.

Section 2. This Ordinance shall take effect from and after its passage and approval.

Approved October 3, 1889."

#### IV.

That the plaintiff, Boise City, on the 10th day of July, 1890, by its Mayor and Common Council, passed and adopted the following ordinance, to wit:

"An Ordinance Granting to the Artesian Water and Land Improvement Company the right to Lay Water-pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, do ordain:

Section 1. The privilege of laying down and maintaining water-pipes in the streets and alleys now laid out, or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to the

Artesian Water and Land Improvement Company, its successors or assigns.

Section 2. All water-pipes placed in said streets and alleys shall be laid down in a workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

Section 3. This Ordinance shall take effect and be in force from and after its passage.

Approved July 10, 1890.”

#### V.

That the said Artesian Water and Land Improvement Company was a corporation duly organized under Chapter V of Title IV of the Civil Code of Idaho, relating to water and canal corporations, for the purpose of supplying plaintiff and its inhabitants with water for public and family use.

#### VI.

That after the passage and approval of the Ordinance mentioned in Finding III hereof, the said Eastman Brothers proceeded immediately to construct a waterworks plant and system consisting of artesian wells and reservoirs and laid mains and pipes under and along plaintiff's streets and alleys and supplied plaintiff and its inhabitants with pure mountain water in accordance with said ordinance.

That up to the time said Eastmans sold and conveyed their waterworks plant and rights to the Artesian Hot and Cold Water Company, Limited, they had expended in the construction thereof over Twenty Thousand Dollars.

#### VII.

That after the passage and approval of the

ordinance mentioned in Finding IV the said Artesian Water and Land Improvement Company proceeded immediately thereunder to sink artesian wells, construct reservoirs and lay pipes under and along plaintiff's streets and alleys and to supply plaintiff and its inhabitants with pure, fresh water for municipal, domestic and irrigation purposes.

That up to the time this company sold and conveyed its waterworks and property to the Artesian Hot and Cold Water Company, Limited, it expended in the construction, extension and improvement thereof over Fifty Thousand Dollars.

#### VIII.

That the Artesian Hot and Cold Water Company, Limited, was a corporation duly organized under Chapter V of Title IV of the Civil Code of Idaho, relating to water and canal corporations and was authorized by its articles of incorporation to supply plaintiff and its inhabitants with water for municipal and domestic uses and to purchase and acquire the waterworks, wells, reservoirs, pipe-lines, properties, rights and franchises of the said Eastman Brothers and said Artesian Water and Land Improvement Company.

#### IX.

That on the 28th day of March, 1891, the said Eastman Brothers and the said Artesian Water and Land Improvement Company sold and conveyed to said Artesian Hot and Cold Water Company, Limited, each of their waterworks systems and all property belonging thereto and all rights, privileges and



franchises granted to them respectfully by the ordinances set forth in Findings III and IV.

X.

That on the 28th day of August, 1901, the said Artesian Hot and Cold Water Company, Limited, sold and conveyed to the defendant its entire water-works systems and plant, including all of its wells, reservoirs, pumping plants, pipe-lines, pipes, real and personal property of every nature, and also all of the rights, privileges and franchises which had been granted to it and to its predecessors in interest by the Ordinances of Boise City.

XI.

That during the time between the 28th day of March, 1891, and the 28th day of August, 1901, the said Artesian Hot and Cold Water Company, Limited, supplied plaintiff and its inhabitants with pure, fresh water for municipal, domestic and other useful purposes, and during said time the population of Boise City increased from about three thousand to about six thousand inhabitants, and the area thereof was greatly enlarged by the laying out and platting of additions thereto, which were settled upon and occupied, and during said period said Artesian Hot and Cold Water Company, Limited, with plaintiff's knowledge and consent, extended its pipe-lines under the streets and alleys of said city, from time to time, and supplied said additions with water to meet the demands therefor. That during said period said Company laid about fifteen miles of additional pipe-lines for cold water supply,

constructed two wells and one reservoir for cold water, erected a large steam pumping plant with a capacity of three million gallons per day and made improvements to its cold water plant aggregating in cost more than one hundred and ninety-two thousand dollars.

## XII.

That at all times since said 28th day of August, 1901, this defendant has supplied to plaintiff and its inhabitants, by virtue of said ordinances and laws, and with plaintiff's knowledge, acquiescence and consent, pure, fresh water for municipal, domestic and other useful purposes in accordance with said ordinances and in full compliance therewith and with said laws of Idaho. That since said last-named date the population of Boise City has increased from about six thousand to over twenty-five thousand inhabitants, and this defendant, with plaintiff's knowledge, acquiescence and consent, has extended its cold water system to meet the growth of said city and has laid over thirty miles of additional mains under the streets and alleys of said city, constructed numerous wells and galleries, acquired by condemnation proceedings additional land for the development of an increased water supply, installed four electric pumps of an aggregate capacity of six and one-half million gallons of water per day and has expended in the improvement and extension of said cold water system an additional sum of more than one hundred and forty thousand dollars.

XIII.

That the defendant and its predecessors in interest in and to its waterworks system are now, and ever since the 3d day of October, 1889, have been using the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff and residents and inhabitants of Boise City, through the water mains of said waterworks systems, and in the laying and repairing of said water-pipes connected with said waterworks systems.

XIV.

That the plaintiff, Boise City, on the 7th day of June, 1906, enacted and approved an ordinance of said City, No. 678, as follows, to wit:

“An Ordinance requiring the Boise Artesian Hot and Cold Water Company, a private corporation, organized and existing under *the* by virtue of the laws of the State of West Virginia, to pay to Boise City, a municipal corporation of the State of Idaho, on the first day of each and every month, a monthly license of \$300 for the use and occupancy of the streets and alleys of said Boise City, Idaho, in furnishing water to the residents of said city.

Whereas, Boise City, is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and

Whereas, The Boise Artesian Hot and Cold Water Company, is a private corporation organized, existing and operating under the laws of the State of West Virginia, and

Whereas, said Boise City, on the 3d day of October, 1889, approved an ordinance granting to H. B.



Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city, for profit, and

Whereas, the said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks.

Now, therefore, Boise City does ordain as follows:

Section 1. That the said Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of \$300 for the privilege granted by said ordinance of October 3, 1889, to lay and repair water-pipes in the streets and alleys of said city through which water is being furnished to the inhabitants of said Boise City by said Company.

Section 2. That demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of \$300 required by Section 1 of this Ordinance.

Section 3. That the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot & Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

Section 4. That nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid Ordinance of October 3, 1889.

Section 5. This Ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31st day of May, 1906.

Vetoed by the Mayor June 2d, 1906.

Passed over the Mayor's veto June 7th, 1906, by a vote of 8 Ayes; 3 Noes."

#### XV.

That the whole number of the members of the Common Council of the plaintiff, Boise City, on the 7th day of June, 1906, was twelve members and that said Ordinance No. 678, after the same was vetoed by the Mayor of the plaintiff on the 2d day of June, 1906, was thereafter on the 7th day of June, 1906, passed by the Common Council of said Boise City, over the veto of said Mayor, by a two-thirds vote cast by the Common Council of said Boise City.

#### XVI.

That the City Clerk of said Boise City duly notified the said defendant of the requirements of said

Ordinance No. 678, and from and after the enactment of said Ordinance No. 678, and until this action was begun, did on the first day of each and every month, demand of said defendant the payment of said monthly license of three hundred dollars, required by said Ordinance, but the said Defendant refused on the first day of each and every month after the enactment and approval of said Ordinance No. 678 until the beginning of this suit and still refuses and neglects to pay said monthly license, or any part thereof, to said Boise City.

#### XVII.

That on the 6th day of December, 1906, the plaintiff by its mayor and common council, passed and approved Ordinance No. 699, requiring and ordering the proper officers of said Boise City to institute an action for and on behalf of said Boise City in any court of competent jurisdiction, against the said defendant for the enforcement of the provisions of said Ordinance No. 678 and the collection from said defendant of the sum of money due said Boise City from said defendant under the provision of said Ordinance No. 678.

#### XVIII.

That all of the aforesaid ordinances are now, and ever since their said passage and approval, have been in full force and effect.

#### XIX.

That since the passage of said ordinance mentioned in Finding XIV, said plaintiff and its common council have claimed that the ordinances set



forth in the findings III and IV, were and are mere licenses which may be revoked or annulled at the will of said common council, and that said common council may compel this defendant to discontinue its business of supplying water and of using said streets and alleys therefor or subject it to the payment of the license fee or any other burdens for such privilege.

### XX.

That each and every year since this defendant and its grantors have been engaged in the business of supplying water, their waterworks and all property, both real and personal, owned by them in the Territory and State of Idaho, have been duly assessed for payment of all State and county, city and school taxes in like manner and to the same extent and in the same proportion to the value thereof, as all other property in said Boise City, and this defendant and its predecessors in interest have each and every year paid to the proper tax collector the full amount of each and all of the taxes so assessed against their property.

### XXI.

That on the 11th day of May, 1905, two commissioners were appointed by the mayor and common council of the plaintiff, Boise City, and two commissioners were thereafter appointed by the defendant, for the purpose of fixing and determining the rates to be charged by the defendant for water for domestic, municipal and other purposes in said Boise City. That said commissioners met and adopted a schedule of rates to be charged by de-

fendant for all purposes mentioned in section 2711 of the Revised Statutes of Idaho, and the act approved March 9, 1905, amendatory thereof. That the rates so adopted were intended to yield to defendant a net return of six per cent per annum upon the then value of defendant's waterworks plant, and that such rates have not and will not yield to defendant a greater return. That the said rates so fixed by said commission were, after August 1, 1905, and still are charged by defendant for water and that defendant has, at all times, acquiesced in the rates so fixed and regulated its charges accordingly, and that said license tax levied by plaintiff was not considered or contemplated by said Commission in fixing said rates, and that its enforcement will reduce defendant's net income to an amount considerably less than that fixed by said commission.

#### XXII.

That the Eastman Brothers and the Artesian Water and Land Improvement Company and the defendant paid no pecuniary consideration for the grants made to them of the use of said streets and alleys and no pecuniary consideration therefor was ever demanded or required by said plaintiff therefor, prior to the passage of Ordinance No. 678 set forth in Finding XIV.

#### XXIII.

That the amount in controversy in this action, exclusive of interest and costs, exceeds the sum or value of Two Thousand Dollars.

**Conclusions of Law.**

As conclusions of law the Court finds:

**I.**

That the ordinance of July 10, 1890, to the Artesian Water and Land Improvement Company, a corporation, its successors or assigns, was granted in view of the limitation of fifty years, fixed upon its duration by section 2710 of the Revised Statutes of Idaho, and is not a mere license subject to recall at any time, and that this ordinance, having been accepted and acted upon by the grantee and its successors, creates a franchise for fifty years.

**II.**

That the imposition of the license tax set forth in Finding XIV is an impairment of such franchise and is, therefore, void.

**III.**

That the defendant is entitled to judgment with costs of suit.

Let judgment be entered in accordance herewith.

Dated April 20, 1910.

WM. B. GILBERT,  
Judge.

[Endorsed]: Filed April 22, 1910. A. L. Richardson, Clerk.



*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the  
State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED (A Cor-  
poration),

Defendant.

### **Judgment.**

This cause coming on regularly for hearing before the Court, a jury trial having been expressly waived by stipulation in writing filed herein, upon the pleadings, proofs taken and stipulations filed herein, F. B. Kinyon, Esq., and Messrs. Cavanah & Blake appearing as attorneys for the plaintiff, and Richard H. Johnson, Esq., appearing as attorney for the defendant, and the same having been argued and submitted to the Court for consideration and decision, and the Court after due deliberation, having filed its findings and decision in writing, and ordered that judgment be entered herein in accordance therewith;

Now, therefore, by virtue of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff take nothing by this action, and that the defendant do have and recover of and from said plaintiff, its costs and disbursements herein, amounting to the sum of \$22.20.

Judgment entered April 26, 1910.

United States of America,  
District of Idaho,—ss.

I, A. L. Richardson, do hereby certify that the above and foregoing is a true and correct copy of the Judgment in the above-entitled cause, entered in Judgment Book No. 1 of said court, at page 421.

Witness my hand and the seal of said court this 26th day of April, 1910.

A. L. RICHARDSON,  
Clerk.

[Endorsed]: Filed Apr. 26, 1910. A. L. Richardson, Clerk.

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*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the  
State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, LIMITED (A Cor-  
poration),

Defendant.

**Bill of Exceptions.**

Be it remembered that on the 12th day of January, 1910, this cause came on for trial in said court before the Honorable William B. Gilbert, the Judge presiding, F. B. Kinyon, Esq., and Cavanah & Blake, appearing as counsel for the plaintiff, and Johnson & Johnson, appearing as counsel for the defendant. A jury having been heretofore expressly waived by

both parties the trial was had before the Court, whereupon said parties filed their agreed stipulation of facts, which are as follows:

*In the Circuit Court of the United States for the District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (A Corporation),

Defendant.

**Stipulation of Facts [First—in Bill of Exceptions].**

It is hereby stipulated by and between the parties to the above-entitled action by their attorneys herein that the following shall constitute a statement of the facts agreed upon in said action to be used on the final trial hereof before the Court, a jury being expressly waived herein.

1. The first, second, fourth, fifth, sixth, seventh, eighth, ninth and tenth allegations of plaintiff's amended complaint are admitted.

2. All of the third allegation of said complaint is admitted except that portion thereof on the fourth and fifth lines of said allegation, which states that said ordinance is "a license for an indefinite period."

3. That the first, seventh and eighth allegation of defendant's answer to said amended complaint are hereby admitted to be true.

4. That the sixth allegation of defendant's said answer, including Exhibit "A" therein referred to,



is hereby admitted to be true, but plaintiff does not admit that the ordinances referred to in said allegation were passed by the common council of plaintiff under authority of the general laws of Idaho.

5. That the ninth and tenth allegations of defendant's said answer are hereby admitted to be true, but plaintiff does not admit that the ordinances mentioned in said allegations and in the said sixth allegation are franchises or that defendant furnished such water under authority of or in accordance with the laws of Idaho, or that such laws apply to the furnishing of water in Boise City, but plaintiff admits that the defendant and its predecessors in interest, in furnishing such water, complied with all conditions and requirements contained in such laws, and plaintiff reserves its objection as to the admissibility of the facts set forth in the said ninth and tenth allegations on the ground that they are irrelevant, incompetent and immaterial and no defense to the action.

6. As to the eleventh allegation of said answer, plaintiff admits that after the passage of said ordinances purporting to give the rights to use the streets and alleys of said city, the predecessors of said defendant proceeded to lay their pipes and supply said water, and that defendant and its said predecessors in interest have ever since continued so to do by reason of the passage of said ordinances, and that since the passage of said ordinance mentioned in the sixth allegation of said complaint, said plaintiff and its common council have claimed that said ordinances were and are revocable licenses, as alleged in said eleventh allegation of said answer.

7. The twelfth allegation of said answer is hereby admitted to be true, but plaintiff reserves the objection that the facts therein stated are immaterial, irrelevant and incompetent and not a defense to the action.

8. As to the thirteenth allegation of said answer, plaintiff admits the appointment of the commissioners, and that they met and adopted a schedule of rates to be charged by defendant for all purposes mentioned in said allegation, and that said rates were intended to yield the net return of six per cent mentioned therein, and that they do not now and will not yield a greater return, and that the said rates so fixed by said commission were, after August 1, 1905, and still are, charged by defendant for water, and that defendant has at all times acquiesced in the rates so fixed, and regulated its charges accordingly, and that said license tax levied by plaintiff was not considered or contemplated by said commission in fixing said rates, and that its enforcement will reduce defendant's net income to an amount considerably less than that fixed by said commission, as set forth in said thirteenth allegation of said answer, but plaintiff does not admit that the statutes referred to in said allegation have application to the appointment of commissioners in said Boise City, or that they could be legally appointed pursuant to said statutes.

9. That the fourteenth allegation of said answer is hereby admitted to be true and it is stipulated that the franchise to the Capital Water Company mentioned therein is, by its terms, limited to endure for

a period of fifty years, and plaintiff reserves its legal objection that said franchise was not granted under the laws of Idaho therein referred to, and that the facts stated in said thirteenth and fourteenth allegations are irrelevant, incompetent and immaterial and not a defense to the action.

10. It is admitted that the said Eastman Brothers and the said Artesian Water and Land Improvement Company and said defendant paid no pecuniary consideration for the grants made to them of the use of said streets and alleys, and that no pecuniary consideration therefor was ever demanded or required by said plaintiff therefor, prior to the passage of said ordinance No. 678, which is hereto attached, marked Exhibit 1, and admitted in evidence.

11. It is admitted that plaintiff has made due and proper demand upon defendant for the payment of the amount prayed for in said complaint and that defendant has paid no part thereof.

It is hereby stipulated by counsel in the above-entitled action that the defendant has furnished water to plaintiff as shown in the annexed statement, during the year 1909, and paid the defendant the amounts thereon stated.

That the city council of plaintiff in the month of December, 1909, by resolution directed defendant company to install fire hydrants for use by the city fire department on the defendant mains as follows: On the corner of North 17th and Sherman Streets; North 19th and Sherman Streets; North 17th and Brumback Streets; North 21st and Resseguie Streets; and West State and 19th Streets.



That the plaintiff reserves its objection to the admissibility of the above facts on the ground that they are irrelevant, immaterial and incumbent and not a defense to this action.

AMOUNT PAID BY CITY OF BOISE TO THE  
BOISE ARTESIAN HOT AND COLD  
WATER COMPANY, from January 1st, 1908,  
to December 1, 1909.

Date Paid. 1908.	Domestic Use.	Flushing Sewers.	Street Sprinkling.	Heating.
January 4th	45.55	348.30	880.80	
February 8	30.40	177.55		
March 7	23.05	176.40		
April 6	24.55	176.40		
June 6	45.15	307.45		
August 10	50.24	94.60		
Sept. 10	29.66	47.30		
Oct. 6	30.03	47.30		
Nov. 7	31.16	47.30	3,300.00	
Dec. 5	26.00	47.30		500.00
1909.				
January 6			354.46	
March 8	69.80	140.82		
May 10	32.60	47.30		
June 9	36.60	47.30		
July 6	40.55	47.30		
August 18	49.75	47.30		
Oct. 4	67.50	94.60	2,000.00	
Nov. 7	57.00	47.30		337.00
Dec. 4	38.25	47.30	1,763.84	
	<hr/>	<hr/>	<hr/>	<hr/>
	\$727.84	\$1,989.12	\$8,299.10	\$837.50

Summary:

Cold water for domestic use.....	\$	727.84
“ “ “ sewer flushing .....		1,989.12
“ “ “ street sprinkling... ..		8,299.10
Hot “ “ Heating City Hall.... ..		837.50
		<hr/>
Total.....	\$	11,853.56

Filed Oct. 23rd, 1909.

FRANK B. KINYON and  
CAVANAH & BLAKE,  
Attorneys for Plaintiff.  
JOHNSON & JOHNSON,  
Attorneys for Defendant.

**Ordinance No. 678.**

By Councilman Davis.

AN ORDINANCE REQUIRING THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, A PRIVATE CORPORATION ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF WEST VIRGINIA, TO PAY TO BOISE CITY A MUNICIPAL CORPORATION OF THE STATE OF IDAHO ON THE FIRST DAY OF EACH AND EVERY MONTH, A MONTHLY LICENSE OF \$300.00 FOR THE USE AND OCCUPANCY OF THE STREETS AND ALLEYS OF SAID CITY.

WHEREAS, Boise City is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and

WHEREAS, The Boise Artesian Hot and Cold Water Company is a private corporation, organized, existing and operating under the laws of the State of West Virginia, and,

WHEREAS, said Boise City on the 3d day of October, 1899, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city for profit, and,

WHEREAS, The said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks.

NOW, THEREFORE, BOISE CITY DOES ORDAIN AS FOLLOWS:

SECTION 1. THAT, The Boise Artesian Hot and Cold Water Company, a private corporation organized under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1899, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of \$300.00 for the privilege granted by said ordinance of October 3, 1899, to lay and repair water-pipes in the streets and alleys of said City through



which water is being furnished to the inhabitants of said Boise City by said Company.

SECTION 2. THAT, Demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month, said monthly license of \$300.00 required by Section 1 of this ordinance.

SECTION 3. THAT, The City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot and Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

SECTION 4. THAT, Nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid Ordinance of October 3, 1899.

SECTION 5. THIS Ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31 day of May, 1906.

Vetoed by the Mayor June 2, 1906.

Passed over the Mayor's veto June 7, 1906, by a vote of 8 ayes; 3 noes.

Attest: EMILY L. SAVIDGE,  
City Clerk.

I, E. L. Savidge, City Clerk, hereby certify that the within and foregoing is a true and correct copy of Ordinance No. 678, passed by the Common Council of Boise City, the 31st day of May, 1906, vetoed

by the Mayor the 2d day of June, 1906, passed over the Mayor's veto June 7th, 1906, and of record and on file in this office.

Given under my hand and the seal of Boise City this 26th day of July, 1906.

[Seal]

EMILY L. SAVIDGE,  
City Clerk.

### **Specifications of Error.**

Plaintiff specifies the following as errors made by the Court, and will urge the same as grounds why the judgment should be reversed:

#### **I.**

That the evidence showed that the plaintiff was entitled to recover.

#### **II.**

That the evidence showed that the plaintiff was entitled to recover, in that it appeared from the evidence and particularly from the ordinance No. 94, set forth in paragraph three of plaintiff's amended complaint, and from Exhibit "A" attached to defendant's amended answer, which granted to the defendant's predecessors in interest the privilege of laying down, repairing and maintaining water-pipes in the streets and alleys of Boise City, and under and by virtue of which defendant claims the right to the use of the streets and alleys of Boise City for the purpose of laying down, repairing and maintaining its water-pipes, do not provide for the length of time such privilege was to be enjoyed.

#### **III.**

That the evidence showed that the plaintiff was entitled to recover from the defendant, for the reason

that it appears from said Ordinance No. 678, herein set forth, that the defendant is required to pay plaintiff a monthly license for the use and occupancy of the streets and alleys of Boise City for the sale and delivery of water to the plaintiff and the inhabitants of Boise City through the water-pipes laid by the defendants in the streets and alleys of said Boise City.

IV.

That the judgment is not sustained by the evidence and is contrary to the evidence in that it appears from the evidence that the only right which the defendant had was a mere license to use the streets and alleys of Boise City which was revocable at the will of said city.

FRANK B. KINYON and  
CAVANAH & BLAKE,

Attorneys for the Plaintiff, Residing at Boise, Idaho.

The above and foregoing bill of exceptions is hereby presented for settlement by counsel for plaintiff, as their bill of exceptions in said cause.

FRANK B. KINYON and  
CAVANAH & BLAKE,

Attys. for Plaintiff, Residing at Boise, Idaho.

Service of copy of foregoing Bill of Exceptions is admitted this 4th day of May, 1910.

JOHNSON & JOHNSON,  
Attys. for Defendant.

**[Stipulation Re Bill of Exceptions.]**

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendant in the



above-entitled cause, that the foregoing may be allowed and settled as the bill of exceptions in said cause, and that the same may be settled and allowed by the Judge before whom said cause was tried, either in the State of California or the State of Oregon.

FRANK B. KINYON and  
CAVANAUGH & BLAKE,

Attys. for the Plaintiff.

JOHNSON & JOHNSON,

Attys. for the Defendant.

**[Order Allowing, etc., Bill of Exceptions.]**

Now that the foregoing matters may be made a part of the record, the undersigned, Judge of the Circuit Court, of the Ninth Circuit, being the Judge before whom said cause was tried upon stipulation of the attorneys for the respective parties herein does hereby allow, settle and sign within the time allowed by law *and* foregoing bill of exceptions, and orders the same to be filed.

WM. B. GILBERT,

Judge.

[Endorsed]: Filed May 13, 1910. A. L. Richardson, Clerk.

*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the State  
of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WA-  
TER COMPANY, LIMITED (a Corpora-  
tion),

Defendant.

**Petition for Writ of Error.**

To the Honorable Judges of the United States Cir-  
cuit Court of Appeals, Ninth Judicial Circuit.

Comes now the above-named plaintiff, by its at-  
torneys, and complains that in the record and pro-  
ceedings had in said cause, and also in the rendi-  
tion of the judgment in the above-entitled cause in  
said United States Circuit Court, for the Ninth Judi-  
cial District of the District of Idaho, Central Divi-  
sion, against said plaintiff on the 27th day of April,  
1910, manifest error hath happened to the great  
damage of the said plaintiff.

Wherefore, plaintiff prays that a writ of error  
*may issued* in this behalf out of the United States  
Circuit Court of Appeals, Ninth Circuit, for the cor-  
rection of the errors so complained of, and that a  
transcript of the record, proceedings and papers in

this case, duly authenticated, be sent to the said Court of Appeals.

Dated May 27, 1910.

CAVANAH & BLAKE,  
Attorneys for the Plaintiff, Residing at Boise,  
Idaho.

[Endorsed]: Filed May 28, 1910. A. L. Richardson, Clerk.

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*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the State  
of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WA-  
TER COMPANY, LIMITED (a Corpora-  
tion),

Defendant.

### **Assignment of Errors.**

Comes now the plaintiff and files the following assignment of errors upon which it will rely in its prosecution of writ of error in the above-entitled cause:

#### I.

That the evidence showed that the plaintiff was entitled to recover.

#### II.

That the evidence showed that the plaintiff was entitled to recover in that it appeared from the evi-



dence, and particularly from Ordinance No. 94, set forth in paragraph 3 of plaintiff's amended complaint, as follows, to wit:

ORDINANCE NO. 94.

AN ORDINANCE GRANTING TO EASTMAN BROTHERS THE RIGHT TO LAY WATER-PIPES IN BOISE CITY.

The Mayor and Common Council of Boise City, I. T., ordain:

Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipes in, through, along and across the streets and alleys of Boise City under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along or across which they may lay such pipes in as good condition as they shall find the same, and shall at all times promptly repair all damage done by them or their pipes or by water escaping therefrom.

Section 2. This ordinance shall take effect from and after its passage and approval.

Passed the Council this 3rd day of October, 1889.

Approved:

JAMES A. PINNEY,

Mayor.

[Seal]

Attest: C. S. McCONNELL,

City Clerk.

And from Exhibit "A" attached to defendant's amended answer, which is as follows:

## “EXHIBIT A.”

## AN ORDINANCE GRANTING TO THE ARTESIAN WATER AND LAND IMPROVEMENT COMPANY THE RIGHT TO LAY WATER-PIPES IN BOISE CITY.

The Mayor and Common Council of Boise City, Idaho, do ordain:

Section 1. The privilege of laying down and maintaining water-pipes in the streets and alleys now laid out, or hereafter to be laid out and dedicated to Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.

Section 2. All water-pipes placed in said streets and alleys shall be laid down in workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

Section 3. This Ordinance shall take effect and be in force from and after its passage.

Approved July 10, 1890.

Which granted to defendant's predecessors in interest the privilege of laying down, repairing and maintaining water-pipes in the streets and alleys of Boise City, and under and by virtue of which defendant claimed the right to the use of the streets and alleys of Boise City for the purpose of laying down, repairing and maintaining its water-pipes, do not provide the length of time such privilege can be enjoyed.

## III.

That the evidence showed that the plaintiff was

entitled to recover from the defendant for the reason that it appears from Ordinance No. 678, which is as follows:

ORDINANCE #678.

By Councilman Davis.

AN ORDINANCE REQUIRING THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, A PRIVATE CORPORATION ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF WEST VIRGINIA TO PAY TO BOISE CITY, A MUNICIPAL CORPORATION, OF THE STATE OF IDAHO ON THE FIRST DAY OF EACH AND EVERY MONTH, A MONTHLY LICENSE OF \$300.00 FOR THE USE AND OCCUPANCY OF THE STREETS AND ALLEYS OF SAID CITY.

WHEREAS, Boise City is a municipal corporation, organized and existing under and by virtue of the laws of the State of Idaho; and,

WHEREAS, The Boise Artesian Hot and Cold Water Company, is a private corporation organized, existing and operating under the laws of the State of West Virginia; and,

WHEREAS, said Boise City on the 3d day of October, 1889, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city for profit; and,



WHEREAS, The said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman, in and to said waterworks.

NOW THEREFORE, BOISE CITY DOES ORDAIN AS FOLLOWS:

SECTION 1. THAT the Boise Artesian Hot and Cold Water Company, a private corporation organized under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman, in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of \$300.00, for the privilege granted by said ordinance of October 3, 1889, to lay and repair water-pipes in the streets and alleys of said City through which water is being furnished to the inhabitants of said Boise City by said company.

SECTION 2. That demand is hereby made by said Boise City of and from the said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of \$300.00 required by Section 1 of this Ordinance.

SECTION 3. That the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot and Cold Water Company, of the requirements of this ordinance to pay said license as aforesaid.



tiff and the inhabitants of said Boise City through water-pipes laid by defendant in the streets and alleys of said Boise City.

#### IV.

The Court erred in rendering judgment for the defendant for the reason it appears from Ordinances No. 94 and Exhibit "A" above referred to, that defendant had but a mere license to the use of the streets and alleys of Boise City revocable at any time at the option of said City.

#### V.

That the judgment is not sustained by the pleadings.

#### VI.

That the trial court erred in entering a judgment in favor of the defendant and against the plaintiff.

#### VII.

That the Court erred in overruling plaintiff's demurrer to defendant's amended answer.

Wherefore, plaintiff and appellant prays that the judgment of said court be reversed.

FRANK B. KINYON and  
CAVANAH & BLAKE,

Attorneys for the Plaintiff, Residence and Postoffice  
Address, Boise, Idaho.

[Endorsed]: Filed May 4, 1910. A. L. Richardson,  
Clerk.



*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the State  
of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WA-  
TER COMPANY, LIMITED (a Corp.),  
Defendant.

**Stipulation [Waiving Filing of Bond on Writ of Er-  
ror].**

It is hereby stipulated and agreed by and between counsel for the respective parties in the above-entitled cause that the filing of a bond on the writ of error herein is waived and no bond or undertaking need be filed.

Dated May 4th, 1910.

FRANK B. KINYON and  
CAVANAHA & BLAKE,

Attorneys for Plaintiff.

RICHARD H. JOHNSON,  
Attorney for Defendant.

[Endorsed]: Filed May 4, 1910. A. L. Richardson, Clerk.

*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation of the State  
of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WA-  
TER COMPANY, LIMITED (a Corpora-  
tion),

Defendant.

**Order Allowing Writ of Error, etc.**

It is hereby ordered that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein;

And it appearing that the parties in the above-entitled cause have filed a stipulation waiving bond on said writ of error. It is hereby ordered that no bond herein need be filed.

Dated this 2d day of June, 1910.

WM. B. GILBERT,

Judge.

[Endorsed]: Filed June 4, 1910. A. L. Richardson, Clerk.

*In the Circuit Court of the United States for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation,  
Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WA-  
TER COMPANY, LIMITED (a Corp.),  
Defendant.

**Praecipe for Transcript.**

To A. L. Richardson, Clerk of the Above-entitled  
Court:

You are hereby notified that we have filed a petition for writ of error in the above-entitled cause to the Circuit Court of Appeals, Ninth Circuit, which petition has been granted by the Honorable William B. Gilbert, before whom said cause was tried, and we desire that you prepare a transcript of the proceedings in said cause, which transcript shall include all papers filed therein, together with all proceedings had in said cause, except the original complaint and summons filed and issued out of the District Court of the Third Judicial District of the State of Idaho in Ada County.

June 10th, 1910.

Very respectfully,  
FRANK B. KINYON and  
CAVANAHA & BLAKE,  
Attys. for the Plaintiff.



[Endorsed]: Filed June 10, 1910. A. L. Richardson, Clerk.

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[**Writ of Error (Original).**]

*The United States Circuit Court of Appeals, for the Ninth Circuit.*

The United States of America,  
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable  
Judge of the Circuit Court of the United States,  
for the District of Idaho, Central Division,  
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, between Boise City, a municipal corporation, as plaintiff, and The Boise Artesian Hot and Cold Water Company, Limited, a corporation, as defendant, a manifest error hath happened, to the great damage of the said Boise City, a municipal corporation, plaintiff, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, Cal., in said circuit, within

thirty days from the day of signing the citation, in said Circuit Court of Appeals, to be *then there* held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 4th day of June, in the year of our Lord, one thousand nine hundred and ten.

[Seal] A. L. RICHARDSON,  
Clerk U. S. Circuit Court for the District of Idaho.

[Endorsed]: No. 310. Circuit Court of the United States, District of Idaho, Central Division. Boise City, vs. Boise Artesian Hot and Cold Water Company, Ltd. Writ of Error. Filed June 4, 1910. A. L. Richardson, Clerk.

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*In the Circuit Court of the United States, for the  
District of Idaho, Central Division.*

BOISE CITY, a Municipal Corporation,  
Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

**Citation [Original].**

United States of America,—ss.

The President of the United States to The Boise Artesian Hot and Cold Water Company, Limited. And Johnson & Johnson, Its Attorneys, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Idaho, Central Division, wherein Boise City, a municipal corporation is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment of the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of Supreme Court of the United States of America, this 4th day of June, 1910, and of the Independence of the United States the one hundred and thirty-fourth.

WM. B. GILBERT,

United States Circuit Judge Presiding in the Circuit Court for the District of Idaho, Central Division.

[Seal] Attest: A. L. RICHARDSON,

Clerk.



Service of the foregoing citation and receipt of a copy thereof is hereby admitted this 10th day of June, 1910.

JOHNSON & JOHNSON,  
Attys. for Defendant in Error.

[Endorsed]: No. 310. Circuit Court of the United States, Dist. of Idaho, Central Division. Boise City vs. Boise Artesian Hot and Cold Water Co. Citation. Filed on return June 10, 1910. A. L. Richardson, Clerk.

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**Return to Writ of Error.**

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal]            Attest: A. L. RICHARDSON,  
Clerk.

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**[Certificate of Clerk U. S. District Court to Record.]**

*In the Circuit Court of the United States in and for  
the District of Idaho.*

BOISE CITY, a Municipal Corporation,  
Plaintiff in Error,  
vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),  
Defendant in Error.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 107, inclusive, contain true and correct copies of the Amended Complaint, Petition for Removal, Bond on Removal, Order of Removal, Clerk's Certificate with Record, Stipulation, Answer to Amended Complaint, Motion to Strike, Demurrer to Answer, Ordinance No. 699, Stipulation of Facts, Stipulation, Opinion filed July 29, 1909, Order, Opinion filed April 1, 1910, Findings of Fact and Conclusions of Law, Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Error, Stipulation, Order Allowing Writ of Error, Praecipe for Transcript, Writ of Error, Citation, Return to Writ of Error and Clerk's Certificate to Transcript, in the above-entitled cause, which together constitute the transcript of the record and return to the annexed Writ of Error.

I further certify that the cost of the record herein amounts to the sum of \$66.50, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said Court this 18th day of June 1910.

[Seal]

A. L. RICHARDSON,  
Clerk.

[Endorsed]: No. 1875. United States Circuit Court of Appeals for the Ninth Circuit. Boise City (a Municipal Corporation of the State of Idaho), (Plaintiff), Plaintiff in Error, vs. The Boise Artesian Hot and Cold Water Company, Limited (a Corporation), (Defendant), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

Filed June 30, 1910.

F. D. MONCKTON,  
Clerk.

By Meredith Sawyer,  
Deputy Clerk.



